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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 13

BECKER STEEL COMPANY OF AMERICA,
PETITIONER,

vs.

HOMER S. CUMMINGS, ATTORNEY GENERAL
OF THE UNITED STATES, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 27, 1935.

CERTIORARI GRANTED APRIL 29, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BECKER STEEL COMPANY OF AMERICA, Complainant-Appellant,

against

HOMER S. CUMMINGS, Attorney General of the United States in His Official Capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States, Defendants-Respondents

STATEMENT UNDER RULE XIII

This suit in equity under the "Trading with the Enemy Act" was brought by Becker Steel Company of America, the bill of complaint being filed on July 24, 1934. On August 9, 1934, the defendants appearing specially by Hon. Martin Conboy, United States Attorney for the Southern District of New York, served a notice of motion to dismiss the bill of complaint on the ground of lack of jurisdiction of the persons of the defendants or of the subject matter of the action.

By stipulation between the solicitors, the defendants admitted that copies of the complaint were served upon them, and waived all questions as to the manner of such service.

The motion of the defendants came on for argument before United States Circuit Judge Julian W. Mack on Sep- [fol. 2] tember 28, 1934, and he rendered an opinion granting the motion to dismiss for lack of jurisdiction, and signed an order and decree dated October 4, 1934, which was duly entered on October 5, 1934. Notice of appeal and assignment of errors were filed October 15, 1934.

[Subpœna, dated July 24, 1934, omitted by consent.]

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. Vol. 78, P. 289

BECKER STEEL COMPANY, Complainant,

against

HOMER S. CUMMINGS, Attorney General of the United States in His Official Capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States, Defendants.

COMPLAINT

To the Honorable Judges of the United States District Court in and for the Southern District of New York, Sitting in Equity:

Becker Steel Company of America, organized as a corporation under the laws of the State of West Virginia, through its solicitors, Townsend & Kindleberger, presents this its bill of complaint, and respectfully alleges:

First: That at all times mentioned herein complainant was a corporation organized under the laws of the State of West Virginia, and on and prior to June 12, 1929, had its principal place of business in the Borough of Manhattan, City of New York, State of New York, and within the Southern District of New York.

[fol. 4] Second: That heretofore, and on or about the 12th day of June, 1929, the complainant being indebted to the State of West Virginia for corporation taxes, a decree was rendered in a chancery case in West Virginia brought by the State of West Virginia against the Austin Coal & Coke Company and many other resident and non-resident corporations, whereby the Circuit Court of Kanawha County, West Virginia, rendered a decree purporting to forfeit and annul the charter rights of each of said corporations, including the charter of this complainant, said Becker Steel Company of America. This suit is being prosecuted in the name of said Becker Steel Company of America, by the surviving officers, directors and stockholders thereof, to collect property which, in equity and justice, be-

longed to said corporation at the time of said decree of dissolution.

Third: On information and belief, that by Executive Order of the President of the United States, duly made on May 1, 1934, under the provisions of the Act of Congress of March 3, 1933 (47 Stat. 1489, 517), and now in force, the office of the Alien Property Custodian was abolished and the duties and powers of the Alien Property Custodian devolved upon the Attorney General of the United States, and that he is now acting as such Custodian under and pursuant to said executive order, the provisions of the Trading with the Enemy Act, an Act of Congress approved October 6, 1917, and the acts supplemental and amendatory thereof.

Fourth: On information and belief, that the defendant William A. Julian, duly qualified as Treasurer of the United States in or about the month of June, 1933, and is now [fol. 5] performing the duties of said office.

Fifth: This suit arises under the laws of the United States of America, and this court has jurisdiction thereof under said law, particularly under said Act of Congress approved October 6, 1917, known as the Trading with the Enemy Act, and the Acts of Congress amendatory and supplemental thereto.

Sixth: On information and belief that from and after February 9, 1917, the only outstanding capital stock of complainant was 2,200 shares that were owned by Adolf Becker, who had been a citizen of the United States since November 19, 1907; and 200 shares held by William Peters, a citizen of the United States; that the other 5,000 shares which had been previously issued had been surrendered and turned in to complainant's treasury for cancellation, and were duly owned by the complainant.

Seventh: On information and belief that on or about July 12, 1918, A. Mitchell Palmer, the then Alien Property Custodian, and his agents, having theretofore taken possession of the property and records of the complainant, upon the alleged ground that complainant and the stock thereof was owned and controlled by one Reinhold Becker, a resident and subject of the then Empire of Germany, and an enemy alien, or by Stahlwerk Becker, A. G., a German

corporation, owned and controlled by enemy aliens, in violation of law, compelled and caused the issuance by complainant's officers of two certificates of stock of 2,500 shares each in the names of "William Peters, for Reinhold Becker, [fol. 6] or Stahlwerk Becker, A. G."; and by threats and duress and in further violation of law and without legal authority or right, compelled said William Peters to endorse said two certificates over to said A. Mitchell Palmer, as Alien Property Custodian; and thereafter in like violation of law, proceeded to cause the transfer of said two certificates on complainant's books to said Palmer, as Alien Property Custodian, and the issuance to said Palmer in said capacity of a new certificate for 5,000 shares of complainant's stock.

Eighth: On information and belief, that thereafter action was duly brought by the complainant against said Palmer in the United States District Court in and for the Southern District of West Virginia, to require the return of 2,500 shares of said stock (representing the shares allotted for purchase of certain machinery) that was never delivered to the complainant; and thereafter, pursuant to decree of said United States District Court in said action, said 2,500 shares were returned to the complainant by said Palmer.

Ninth: On or about February 20, 1919, said Palmer conducted an alleged sale of the other 2,500 shares of complainant's stock not returned as hereinabove alleged, for the sum of $20,000; which sum was received and turned over by him to the then Treasurer of the United States.

Tenth: That the 2,500 shares of complainant's treasury stock so sold for $20,000 belonged to, and were the sole property of, the complainant: and were unlawfully seized, converted and sold by said Palmer: and were of the full [fol. 7] value of $20,000: and the proceeds of said sale and interest thereon at all times belonged to this complainant.

Eleventh: On information and belief, that from the $20,000, proceeds of said sale of said 2,500 shares of stock of the complainant, unlawfully sold as aforesaid, the then Alien Property Custodian, without the knowledge or authority of the complainant, paid out from the principal of said fund so received the following sums to the following people:

Emery, Booth, Janny & Varney	$210.15
American Appraisal Co.	375.00
Haskins & Sells Audit	60.00
Frank Presbrey Co., Advertising	311.99
" " " Printing	624.33
R. H. Weller	500.00
J. L. Lang	968.75
W. E. Chilton, Leg. Ser.	500.00
E. N. Jones, Expenses	87.62
C. F. Dichey	50.00
Dist. Nat'l Bk. Wash. Dep. Fee	200.00
	$3,887.84

that all of said payments were for advertising and printing of a catalog of the unlawful sale of said stock; for legal services in connection with said unlawful sale, and for other expenses directly due to the making of said sale.

Twelfth: Upon information and belief, that the payments so unlawfully made by the then Alien Property Custodian's office and the then Treasurer of the United States, were made from the principal amount received on the unlawful and improper sale of said stock complained of, and [fol. 8] not from the income or other property of this complainant, which had theretofore been seized by the said Alien Property Custodian, nor were any of the said payments made in connection with the preservation of said property or the care of the same; and none of them could properly have been incurred, if said 2,500 shares of stock had not been improperly and illegally sold, as hereinbefore set forth.

Thirteenth: On information and belief, on or about the 12th day of October, 1922, complainant duly filed with Thomas W. Miller, the then Alien Property Custodian, notice of complainant's claim for the return of said $20,000 (the proceeds of said unlawful and improper sale of said stock), said claim being made pursuant to the provisions of Section 9 of the Trading with the Enemy Act; that said Alien Property Custodian failed to repay said sum of $20,000 with interest thereon, to the complainant.

Fourteenth: On information and belief, that thereafter a suit was brought in the year 1922 in the District Court

of the United States for the Southern District of New York, under Section 9 of said Trading with the Enemy Act, against Thomas W. Miller, the then Alien Property Custodian, and Frank White, the then Treasurer of the United States, for the return of $20,000 the gross proceeds of the sale of said 2,500 shares of stock of the said complainant; which the said bill of complaint charged had been improperly seized and sold by A. Mitchell Palmer, the then Alien Property Custodian. This suit, known as Equity No. 25-35, came on for trial in said United States District Court for the Southern District of New York, before United States [fol. 9] District Judge Augustus N. Hand, sitting in equity, on or about August 5, 1925, who rendered an opinion in favor of the complainant.

Fifteenth: On information and belief, that on or about August 21, 1925, said Judge Augustus N. Hand rendered a final decree, reading as follows:

(Caption and Title)

"This cause came on to be heard at this term, and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the 2500 shares of the capital stock of the complainant, heretofore seized and sold by the Alien Property Custodian, was at the time of said seizure treasury stock belonging to the complainant, a West Virginia corporation, and not subject to seizure and sale as the property of an enemy alien; and it is further

Ordered, adjudged and decreed that Frederick C. Hicks as Alien Property Custodian be and he is hereby substituted in place and stead of Thomas W. Miller as Alien Property Custodian; and it is further

Ordered, adjudged and decreed that the defendants Frederick C. Hicks, as Alien Property Custodian, and Frank J. White, as Treasurer of the United States, forthwith pay to the complainant herein the sum of $20,000, being the amount of the proceeds of the sale of said stock, as prayed for in the bill of complaint herein.

Augustus N. Hand, District Judge."

[fol. 10] No appeal was taken from said judgment and decree.

Sixteenth: On information and belief, that on or about October 10, 1925, when complainant attempted to collect the $20,000 adjudged to be due it under the said decree of Judge Augustus N. Hand made August 21, 1925, the then Alien Property Custodian informed complainant for the first time that his office had expended out of the $20,000 received from the said sale of said stock, various sums aggregating $3,887.84, so that there was only a balance of $16,112.16 in the "trust." The items of the expenditures aggregating $3,887.84 were not given to complainant, and no accounting whatever was rendered to it until in or about the month of September, 1931, when complainant was first informed by the office of the then Alien Property Custodian that certain items aggregating the said sum of $3,887.84, were spent as hereinbefore set forth in this bill of complaint.

Seventeenth: On information and belief that prior to October, 1925, there had been no decision of the United States Supreme Court, or of any United States Circuit Court of Appeals, determining whether the Alien Property Custodian and/or the Treasurer of the United States were entitled to deduct from the property of American citizens improperly seized under the Trading with the Enemy Act, any sum from the principal of said property, or what, if any, deductions could be made from income of property of Americans that might be adjudged under Section 9 of said Trading with the Enemy Act to have been improperly seized.

[fol. 11] Eighteenth: On information and belief, that in October, 1925, it was the general practice of the Attorney General of the United States, the Alien Property Custodian and the Treasurer of the United States, before making any payments under decrees rendered in suits brought under Section 9 of the Trading with the Enemy Act, to insist that the Alien Property Custodian had a right to make various deductions from funds of American individual citizens or corporations, and to refuse to surrender the property of such American citizens or corporations, unless said American citizen or corporation would accept in full settlement of his or its claim solely the property or moneys or funds shown by the books of the Alien Property Custodian or Treasurer of the United States to remain allocated to said fund or trust.

Nineteenth: On information and belief, that following the practice of said Alien Property Custodian and the Treasurer of the United States, the then Alien Property Custodian and the then Treasurer of the United States, refused to deliver to complainant the sum of $16,112.16, admittedly remaining in the so-called "trust", being the net proceeds of the sale of said 2,500 shares of stock of this complainant, less the so-called expenses hereinbefore referred to, unless the complainant would sign, or cause to be signed, a warrant of satisfaction in full of the said decree of Judge Augustus N. Hand, dated August 21, 1925, and a full release; that pursuant to duress in law exerted against this complainant by the then Alien Property Custodian and the then Treasurer of the United States, on October 10, 1925, this complainant and its solicitors signed [fol. 12] and executed the release and warrant of satisfaction of decree, prepared in the form required by the Attorney General of the United States to be signed by this complainant and all others making similar claims.

Twentieth: On information and belief, that in the year 1926, the Supreme Court of the United States rendered its decision in the case of Henkels v. Miller, as Alien Property Custodian, 271 U. S. 298, to the effect that the Alien Property Custodian must pay interest on accumulated moneys in his hands, where the principal was due to American citizens or corporations.

Twenty-first: On information and belief, that after said decision in Henkels v. Miller, as aforesaid, complainant made a claim to the then Alien Property Custodian for accumulated interest on the $20,000 mentioned and described in the said final decree of August 21, 1925.

Twenty-second: On information and belief, that thereafter and in the year 1927, the then Alien Property Custodian and the then Treasurer of the United States, notwithstanding the release and satisfaction of decree that complainant had been compelled to sign as aforesaid, and without requiring the institution of action for said interest, voluntarily paid to complainant, interest on the principal sum of $16,112.16.

Twenty-third: On information and belief, that on April 28, 1930, the Supreme Court of the United States in the case of Escher v. Woods, as Treasurer of the United States,

281 U. S. 379, reversing the decision of the Court of Ap-
[fol. 13] peals of the District of Columbia, held that it was improper for the Alien Property Custodian to deduct two per cent of the amount of the so-called trust in that case. The opinion of Mr. Justice Holmes said:

"But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See Hobbs v. McLean, 117 U. S. 567, 582, 6 S. Ct. 870, 29 L. Ed. 940."

Twenty-fourth: On information and belief, that thereafter by motion dated February 8, 1932, complainant asked the United States District Court for the Southern District of New York for ancillary and supplementary relief to compel Howard Sutherland, the then Alien Property Custodian, and Walter O. Woods, the then Treasurer of the United States, to return and repay to this complainant $3,887.84, which it alleged had been improperly and unlawfully paid out from the principal of the fund belonging to this complainant by the former Alien Property Custodian and the former Treasurer of the United States, together with interest thereon.

[fol. 14] Twenty-fifth: On information and belief, that in opposition to the motion for ancillary and supplementary relief recited in the preceding paragraph of this complainant, the Attorney General of the United States appeared specially and urged that Howard Sutherland and Walter O. Woods, who were then the Alien Property Custodian and Treasurer of the United States, respectively, had not been substituted in the said suit brought by complainant against the former Alien Property Custodian and former Treasurer of the United States, as provided in the Act of Congress of February 13, 1925 (Sec. 11 (28 U. S. C. A. Sec. 780)). Said Act provides that if, during the pendency of an action or suit brought by or against an officer of the

United States, and relating to the present or future charge of his official duties, such officer ceases to hold such office, the suit may be continued by or against his successor in office if application is made within six months after such predecessor has left the office.

Twenty-sixth: On information and belief, that upon said motion United States District Judge Henry W. Goddard held that said Act of Congress of February 13, 1925, Section 11, applied, and as individuals who had been acting as the Alien Property Custodian and Treasurer on August 21, 1925, had resigned and been succeeded by other officials, who had not been substituted as provided in said Act, that the court had no power to allow substitution to be made after the said six-months period, and the court could not require the Alien Property Custodian or the Treasurer of the United States in office in 1932 to pay over money, as they were not parties to the said suit.

[fol. 15] Twenty-seventh. The Circuit Court of Appeals, Second Circuit, 66 Fed. (2d) 513, affirmed the said decision of Judge Goddard, on the ground that a suit is pending until a judgment is entirely satisfied, and that the said statute of 1925 applied; and accordingly no relief could be granted in said former suit.

Twenty-eighth: The Supreme Court of the United States denied on October 16, 1933, the application of the complainant for a writ of certiorari (290 U. S. 667).

Twenty-ninth: On information and belief, that the Supreme Court of the United States, on the 8th day of January, 1934, in the case of Fix v. Philadelphia Barge Co., 290 U. S. 530, held that Section 11 of the Act of February 13, 1925, relating to actions against officers of the United States Government (construed in the said case of Becker Steel Company of America v. Hicks, herinbefore referred to) related only to the particular action before the court, and did not in any way affect the cause of action which a claimant might have against United States officers, but such cause of action might survive, depending on its nature and the applicable rule.

Thirtieth: That in the month of February, 1934, complainant caused application to be made to the Attorney

General of the United States, calling attention to the facts hereinabove stated, and asking a recommendation for the payment of the claim of complainant for the return of $3,887.84 plus interest thereon.

[fol. 16] Thirty-first: After a conference had in the matter on March 1, 1934, the Attorney General's office refused to advise that the claim was valid; and no part of said sum of $3,887.84 with interest has been paid, and the same is now justly due and owing to complainant.

Thirty-second: On information and belief, by reason of the foregoing facts, Homer S. Cummings, Attorney General of the United States, in his official capacity at Alien Property Custodian, and each and every officer holding said position as Alien Property Custodian from July 12, 1918, up to and including the present time, and the Treasurer of the United States in office on July 12, 1918, and each and every Treasurer of the United States since that date (including the Treasurer of the United States at the present time), must be deemed in justice and truth to have had on hand as the property belonging to the complainant the sum of $3,887.84 and interest thereon from July 12, 1918.

Thirty-third: On information and belief, that up to the time of his death on September 22, 1933, Adolph Becker (hereinbefore referred to) was the president of this complainant, a director of the same, and the holdeer of all of its stock. Said Becker left him surviving a widow, Helen Becker; a son, Joseph C. Becker; and a daughter, Mrs. Hurtha M. Hone (formerly Becker), as his sole heirs and next of kin.

Wherefore, complainant prays:

1. That process may issue to be served upon the defendants and each of them, requiring them to appear and make answer thereto.

[fol. 17] 2. Upon the due hearing of the facts in this case and the establishment of complainant's claim herein, the Court may enter a decree and judgment directing and ordering the defendants, as Alien Property Custodian and as Treasurer of the United States, to pay and deliver to complainant the sum of $3,887.84, with interest thereon, to-

gether with costs, and granting complainant such other and further relief as may be just and equitable in the premises.

Townsend & Kindleberger, Solicitors for Complainant, Office and Post Office Address: 31 Nassau Street, Manhattan, New York City.

E. Crosby Kindleberger, of Counsel.

(Verified July 23, 1934.)

In United States District Court, Southern District of New York

In Equity. 78-289

Defendants' Motion to Dismiss.

Please take notice that the undersigned, appearing specially in this proceeding on behalf of the above named de- [fol. 18] fendants, will make a motion on the 14th day of August, 1934 at a motion term of the United States District Court for the Southern District of New York to be held in Room 235, Old Post Office Building, New York, N. Y. at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order dismissing the action herein on the ground that this Court does not have jurisdiction of the persons of the defendants or of the subject matter of the action.

Dated: New York, N. Y., August 9, 1934.

Yours, etc., Martin Conboy, United States Attorney for the Southern District of New York, Attorney for the Defendants, Appearing specially for the purpose of this motion. Office and P. O. Address, United States Courts and Post Office Building, Borough of Manhattan, City of New York.

To Townsend & Kindleberger, Esqs., Solicitors for Complainant, 31 Nassau Street, New York, N. Y.

[fol. 19] IN UNITED STATES DISTRICT COURT

Present: Honorable Julian W. Mack, United States Circuit Judge.

Order E 78-289

DECREE APPEALED FROM—Oct. 4, 1934

This cause came on to be heard on September 28, 1934 on the motion of the defendants, appearing specially, for an order dismissing the bill of complaint herein on the ground that this Court has no jurisdiction over the subject matter of the action or the persons of the defendants, and Martin Conboy, United States Attorney for the Southern District of New York, having been heard in support of said motion, and E. Crosby Kindleberger, having been heard in opposition thereto; and upon consideration thereof, it is

Ordered, adjudged and decreed that the defendants' motion to dismiss the bill of complaint be and the same hereby is granted, with costs to be taxed.

Julian W. Mack, U. S. C. J.

[fol. 20] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E 78-289

BECKER STEEL COMPANY OF AMERICA, Complainant,

against

HOMER S. CUMMINGS, Attorney General of the United States in His Official Capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States, Defendants.

Townsend and Kindleberger, Esqs., Attorneys for Plaintiff. Martin Conboy, United States Attorney, Appearing specially for the purpose of this Motion, Francis H. Horan and Irvin C. Rutter, Assistant United States Attorneys, Attorneys for Defendants.

On Motion to Dismiss for Want of Jurisdiction

OPINION

MACK, Circuit Judge:

The bill alleges in substance that plaintiff is an American citizen, that its property was seized by the former Alien

Property Custodian as the property of an alien enemy and thus wrongfully seized, that it was sold for $20,000, that [fol. 21] nearly $4,000 was paid out by the Alien Property Custodian as expenses directly connected with the sale of such property, that theretofore an action was begun and a decree rendered in this court for $20,000, the value of the property so seized without any allowance for the expenses so incurred, that the decree was satisfied and full releases given by plaintiff on the payment of only the net amount of some $16,000, that thereafter, due to a later decision of the Supreme Court, the Government paid plaintiff interest on the $16,000 and that the amount deducted for the expenses, nearly $4,000, is still owing to the plaintiff. It seeks to recover this sum together with interest thereon from the time of the sale from the present alien Property Custodian and the present Treasurer of the United States.

An earlier suit for the same purpose was dismissed in this court with affirmance by the Circuit Court of Appeals on the ground that the reviver against the then Alien Property Custodian and Treasurer was improper. 66 F. (2d) 497.

Defendants' motion is based upon the propositions, conceded by plaintiff, that the suit is in substance against the United States and that the only authorization for such a suit is Section 9a of the Trading with the Enemy Act. Defendants contend that Section 9a requires for jurisdiction allegation that the Alien Property Custodian or the Treasurer of the United States actually holds, at the time of suit, the moneys sought to be recovered. Plaintiff has failed to allege any such present holding; indeed, it is expressly negatived by the bill. The allegations in the thirty-second paragraph of the bill are not an assertion that either of these defendants now has such money on hand, but only [fol. 22] that they "must be deemed in justice and truth to have" that money.

It is to be noted that plaintiff does not seek to set aside the satisfaction of the judgment for $20,000 or the releases given pursuant to the payment then made, on the ground of fraud, duress or otherwise; it relies solely on Section 9a, but urges that a present holding of any part of the property is not essential to a suit of this kind.

The exact question does not appear to have been decided in any of the cases that have been cited, although, in my

judgment, the intimations are against the interpretation asserted by plaintiff. Escher v. Woods, 281 U. S. 379 (1930); see, too, Kuttroff v. Sutherland, 66 F. (2d) 500 (C. C. A. 2, 1930). Unlike the Escher case, the government is not attempting to charge the proceeds of the sale with general administrative expenses of the Alien Property Custodian department; the allegation is definite that the payment of the expenses incurred in connection with the sale of this very property was made to third parties.

It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and, as decided in Henkels v. Sutherland, 271 U. S. 298 (1925), any income therefrom actually received by the Government. It is not designed to charge the Government with liability for torts whether by the Alien Property Custodian or otherwise, and whether intentionel or through a misconstruction of the law by such official.

[fol. 23] Whether or not plaintiff has or had a remedy against the former Alien Property Custodian personally for the recovery of these moneys if wrongfully deducted, I need not pass upon. Such action at the best would be personal against him and not one in substance against the Government. The question of the effect of the releases would be relevant therein even if otherwise he should be deemed personally liable.

The bill will be dismissed for want of jurisdiction.

Julian W. Mack, U. S. Circuit Judge.

September 28, 1934.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. 78-289

PETITION FOR AND ALLOWANCE OF APPEAL

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Now comes the Becker Steel Company of America, the Complainant herein, by its solicitors, Townsend & Kindle-

berger, and complains that in the records and proceedings had in this cause and also in the rendition of the decree in [fol. 24] the above entitled cause in the District Court of the United States for the Southern District of New York, on the 4th day of October, 1934, certain errors were committed to the prejudice and damage of this complainant; all of which more fully appears in the assignment of errors filed herewith.

Wherefore, the said complainant hereby prays that an appeal may be allowed to the Circuit Court of Appeals for the Second Circuit, from the District Court of the United States for the Southern District of New York, for the correction of errors and the reversal of the final decree so complained of, and that a transcript of the record, proceedings and papers in this cause, as agreed to by the solicitors for the parties hereto duly authenticated, may be sent from said District Court to said Circuit Court of Appeals; and that such other order or process issue as may cause the aforesaid errors and decree to be corrected by the said Circuit Court of Appeals; and the said District Court be directed to enter decrees in this cause in conformity with the demand contained in the bill of complaint herein.

Dated New York, in the District Court of the United States, for the Southern District of New York, this 13th day of October, 1934.

Townsend & Kindleberger, Solicitors for Complainant, 31 Nassau Street, Borough of Manhattan, City of New York.

The foregoing appeal is hereby allowed.
Dated October 13th, 1934.

Francis G. Caffey, U. S. D. J.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 78-289

ASSIGNMENT OF ERRORS

Now comes the above named complainant, by its solicitors, Townsend & Kindleberger, and assigns error in the decree of this Court, entered October 4, 1934, in the following respects:

First: In that the Court erred in holding that Section 9-a of the Trading with the Enemy Act should be interpreted to authorize a deduction from the proceeds received from the sale of property of an American corporation, of alleged expenses for lawyers and accountants and other charges, aggregating nearly $4,000.00, without the consent of the complainant.

Second: In that the Court erred in failing to hold that the interpretation of Section 9-a of the Trading with the Enemy Act, made by the Court, would not render said statute unconstitutional and void, as in violation of the Fifth Amendment to the Constitution of the United States.

Third: In that the Court erred in failing to hold that the Alien Property Custodian and Treasurer of the United [fol. 26] States must be deemed to have held in their possession all sums of money which they were not lawfully authorized to expend; and that the fact that the moneys of the complainant were expended by payments to third persons is an insufficient defense to this suit.

Fourth: In that the Court erred in holding that any remedy that the complainant might have would be against the former Alien Property Custodian personally.

Fifth: In that the Court erred in granting the motion to dismiss the complaint for lack of jurisdiction of the subject matter of the action or of the persons of the defendants.

Wherefore, complainant prays that the said decree of the District Court be reversed and relief granted to the complainant, as set forth in the complaint herein.

Dated New York, October 11, 1934.

Townsend & Kindleberger, Solicitors for Complainant, 31 Nassau Street, New York City.

[fol. 27] Citation, in usual form, omitted in printing.

[fol. 28] In United States District Court for the Southern District of New York

Stipulation as to Transcript of Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court, as agreed on by the parties.

Townsend & Kindleberger, Solicitors for Complainant-Appellant. Martin Conboy, Solicitor for Defendants-Appellees, Appearing Specially.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 30] In United States Circuit Court of Appeals for the Second Circuit

Becker Steel Company of America, Appellant,

against

Homer S. Cummings, Attorney General of the United States in His Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States, Respondents

Before L. Hand, Swan and Chase, Circuit Judges

Appeal from an Order of the United States District Court for the Southern District of New York

E. Crosby Kindleberger for the Appellant.
Martin Conboy for the Appellees.

Opinion—Filed March 4, 1935

Per Curiam:

Order affirmed on opinion below.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BECKER STEEL COMPANY OF AMERICA, Plaintiff-Appellant,

vs.

HOMER S. CUMMINGS, Attorney General of the United States, et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed March 11, 1935

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 32] [File endorsement omitted.]

[fol. 33] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,448. U. S. Circuit Court of Appeals, Second Circuit. Term No. 13. Becker Steel Company of America, petitioner, vs. Homer S. Cummings, Attorney General of the United States, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed March 27, 1935. File No. 13. O. T., 1935.

(6452-C)

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Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted]0 13

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

E. CROSBY KINDLEBERGER,
Of Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1934

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Becker Steel Company of America, formerly a West Virginia corporation, doing business in the Southern District of New York, respectfully shows to this Honorable Court:

I. This is a petition for a writ of certiorari to construe Section 9(a) of the Trading with the Enemy Act (Act of October 6, 1917; chap. 106, 40 Stat. 411); and the relation of the Fifth Amendment of the Constitution of the United States to such statute when property of an American citizen was mistakenly seized and sold. Material parts of the statute are quoted in full in the brief.

II. The District Court for the Southern District of New York, on October 4, 1934, dismissed for want of jurisdiction the bill of complaint brought, under Section 9(a) of the Trading with the Enemy Act, by this complainant and petitioner for the payment to it of $3,887.84, representing a portion of the *net proceeds* of the sale of certain shares of the treasury stock of the complainant, a West Virginia corporation, which had been mistakenly seized by the then Alien Property Custodian, A. Mitchell Palmer, as being enemy-owned.

The bill of complaint alleged that after the net proceeds of the sale of the stock, $20,000.00, were paid to the Alien Property Custodian, this official, and/or the Treasurer of the United States, paid out to third persons without petitioners knowledge or consent $3,887.84 for attorneys' fees, printing of catalogues, accountants' fees, and other charges; and that so far, petitioner has been unable to procure the return of these expenditures, notwithstanding the prior decree of the District Court for the Southern District of New York, that the sale of the complainant's treasury stock was unlawful and void, because in fact not *enemy-owned*.

Circuit Judge Julian W. Mack, sitting in the District Court, dismissed the bill for want of jurisdiction solely upon his interpretation of the Trading with the Enemy Act, that an American citizen could only recover from the United States (represented by the Treasurer, and/or the Alien Property Custodian) the property or money *actually held* by one of these officials at the time of the bringing of suit; and not what they should have held, the interpretation of the statute claimed by the petitioner as the only one consistent with the provisions of the Fifth Amendment to the Constitution of the United States. Judge Mack

in effect added to the word "held" the additional words "at the time of making claim or suit".

Judge Mack, in his opinion, stated that the precise question did not appear to have ever been decided in any of the cases. Our study of the cases confirms this statement, except that complainant believes that the language of certain opinions support its interpretation of the statute.

The Circuit Court of Appeals, Second Circuit, affirmed the dismissal of the suit for want of jurisdiction on the opinion of Judge Mack; and the matter has so far been finally determined against the complainant.

III. This suit raises an entirely different question from that presented to this Court on the applications for writ of certiorari in a previous suit by this complainant (290 U. S. 667), which involved the construction of Section 780 of the Judicial Code of the United States (28 U. S. C. A., Section 780), where there had been a change of government officials during the pendency of the former suit.

By reason of the decision of this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, that where an action against government officials has abated, this referred only to the particular suit or action before the court and not necessarily to the cause of action, this present suit is brought.

IV. The important and novel question of law presented upon this application is whether the right given to bring suit in equity to recover property "held" in Section 9-a of the Trading with the Enemy Act should be construed literally to refer only to property or its proceeds actually or physically in the possession of the Alien Property Custo-

dian or the Treasurer of the United States when suit is brought under this statute, or should be construed liberally to refer to property which, in right and justice, one or more of these officials should hold, at that time.

Petitioner urges that in order to prevent the confiscation of property of an American citizen or corporation, Section 9-a of the Trading with the Enemy Act must be construed to give full and complete relief equal to that which applies in a case where an American citizen's property is taken by eminent domain.

The addition to the statute of the words "at the time of making of claim or the bringing of suit" after the word "held," and the harsh interpretation of the statute made by the courts below would make the statute unconstitutional as in violation of the Fifth Amendment, while the broad and liberal interpretation of the statute urged by petitioner would avoid any doubts as to its constitutionality.

V. Petitioner further alleges that there is a conflict in opinion between the decision of the Circuit Court of Appeals, Second Circuit, in this case and that of the Circuit Court of Appeals, Ninth Circuit, in the case of

Vowinckel v. *Sutherland*, 24 Fed. (2d) 196.

There that Court held that the Custodian was not authorized to make deductions from the property of an American citizen not incurred in protecting or administering the trust.

At page 198 the Court said:

> "If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An

> innocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended. Nor is this a just and reasonable construction of the statute".

It is respectfully urged that the question involved in this case is of great importance and should be decided in favor of petitioner, and that the construction by the lower courts of Section 9-a of the Trading with the Enemy Act is erroneous.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, *Becker Steel Company of America,* Complainant-Appellant, against *Homer S. Cummings,* Attorney General of the United States, in his official capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States, Defendants-Respondents; and that the said judgment of the said Circuit Court of Appeals, denying all relief to the petitioner herein, may be reversed by this Honorable Court, and that a mandate issue directing the District Court of the United States to make a decree that the petitioner be paid the sum of $3,887.84, with interest or increment, from February 20, 1919 (the date of the unlawful sale of its property), and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

BECKER STEEL COMPANY OF AMERICA

By E. CROSBY KINDLEBERGER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Holdings of the Lower Courts

The District Court, for the Southern District of New York, dismissed this case for want of jurisdiction (R. 19), on an opinion (R. 20-23), rendered by Hon. Julian W. Mack, United States Circuit Judge (not reported).

In the Circuit Court of Appeals, Second Circuit, the decree was affirmed (R. 30) on the opinion of the court below, and is also not reported.

II

Jurisdiction

1. The date of the decree to be reviewed is March 11, 1935 (R. 30).

2. The jurisdiction of this Honorable Court is invoked under the Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938; 28 USCA, Sec. 347 (a).

III

Statute Involved

In addition to the Fifth Amendment of the Constitution of the United States, this case involves the construction of Section 9-a of the Trading with the Enemy Act, which reads as follows:

> "Section 9. *Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.* (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian

a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this

Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."
(Act of Oct. 6, 1917, chap. 106, 40 Stat. 411.)

IV

The Facts

The facts of the case are not in dispute; the courts below having held that on the facts stated in the bill of complaint, the proper construction of Section 9-a of the Trading with the Enemy Act gave no jurisdiction to the court to render a decree for the complainant-petitioner. The courts below denied, for lack of jurisdiction without considering the merits, a decree which petitioner sought, requiring the Attorney General, as the Acting Alien Property Custodian, or the Treasurer of the United States, to pay and deliver to the petitioner the sum of $3,887.84, which it alleges had been collected from the wrongful sale of the petitioner's property and afterwards paid out to third persons for fees and charges not connected with the protection of the trust or its administration, and solely occasioned by the wrongful sale of stock of petitioner, an American corporation, which had been adjudicated not to have been *"enemy-owned"*.

The bill of complaint, after referring to the incorporation of the complainant under the laws of West Virginia (R. 3) and that the Attorney General was now acting as Alien Property Custodian under statutory authority (R. 4), and that respondent Julian was duly qualified as Treas-

urer of the United States (R. 4), set forth that the suit was brought under the laws of the United States of America, and particularly under the Trading with the Enemy Act, and the Acts of Congress amendatory and supplemental thereto (R. 5).

It was then alleged that from and after February 9, 1917, the only outstanding capital stock of the complainant was 2,200 shares owned by one Becker who had been an American citizen since 1907 and 300 shares by William Peters, now an American citizen, and that the other 5,000 shares which had been previously issued had been surrendered and turned in to plaintiff's treasury for cancellation, and were owned by the complainant (R. 5).

The Seventh paragraph of the bill alleged that about July 12, 1918, A. Mitchell Palmer, then acting as Alien Property Custodian, claimed that 5,000 shares of the stock of this complainant held in its treasury was in fact enemy-owned, compelled its re-issuance and transfer to himself as Alien Property Custodian (R. 5, 6).

It was next alleged that the United States District Court for the Southern District of West Virginia, by decree directed the return of 2,500 shares to the complainant, but that on February 20, 1919, the other 2,500 shares of complainant's stock were sold for $20,000—

> "which sum was received and turned over by him to the then Treasurer of the United States" (Par. Ninth, R. 6).

The complainant then alleged that the 2,500 shares of complainant's stock so sold for $20,000 belonged to and were the sole property of the complainant; and were unlawfully seized, converted and sold by said A. Mitchell Palmer; and were of the full value of $20,000; and that

the proceeds of said sale and interest thereon at all times belong to this complainant (Par. Tenth, R. 6 and 7).

In Paragraph Eleventh it was alleged that from the $20,000 proceeds of said sale of said stock unlawfully sold, the then Alien Property Custodian, without knowledge or consent of the complainant, paid out from the principal of the fund so received to third persons named in the bill of complaint eleven specified items, aggregating $3,887.84—

> "that all of said payments were for advertising and printing of a catalog of the unlawful sale of said stock; for legal services in connection with said unlawful sale, and for other expenses directly due to the making of said sale" (Par. Eleventh, R. 7).

The Twelfth Paragraph of the bill alleged that these unlawful payments by the Alien Property Custodian and the Treasurer of the United States were made from the principal amount received on the unlawful and improper sale of the stock, and not from the income or other property of the complainant; and that none of the payments made to third persons, were in connection with the preservation of the property or its care—

> "and none of them could properly have been incurred, if said 2500 shares of stock had not been improperly and illegally sold, as hereinbefore set forth" (Par. Twelfth, R. 7 and 8).

The making of the claim for $20,000, the proceeds of the unlawful sale of the complainant's stock under Section 9-a of the Trading with the Enemy Act was referred to (Par. Thirteenth); the bringing of suit under Section 9 and its trial in Par. Fourteenth (R. 8 and 9); the decree made by U. S. District Judge Augustus N. Hand, dated

August 21, 1925, adjudged the sale illegal, because the stock belonged to the complainant, a West Virginia corporation, and

> "was not subject to seizure and sale as the property of an enemy alien" (R. 9);

and directing that the $20,000 be returned.

Subsequent paragraphs of the bill refer to complainant's attempt to collect the $20,000 due it; the refusal of the Government officials to pay the entire amount; $16,112.16 being all the money claimed to have remained in the alleged trust (Par. Tenth, R. 10); the circumstances of the payment of the $16,112.16 and the claim by complainant that such circumstances constituted duress in law (Pars. Seventeenth, Eighteenth and Nineteenth). Then follow allegations of a subsequent claim by complainant for interest under the case of *Henkels* v. *Sutherland*, 271 U. S. 298 (Pars. Twentieth-Twenty-second, R. 12); the decision of this Court in *Escher* v. *Woods*, 281 U. S. 379 (Par. Twenty-third, R. 12 and 13); previous attempts to secure payment of the $3,887.84; and denial of relief on the ground that the suit had abated (Pars. Twenty-fourth to Twenty-ninth, R. 13-15); the resubmission of the claim to the Attorney General of the United States in February 1934, and the refusal to make payment (Pars. Thirtieth and Thirty-first, R. 15 and 16). Then follows this allegation:

> "Thirty-second: On information and belief, by reason of the foregoing facts, Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and each and every officer holding said position as Alien

> Property Custodian from July 12, 1918, up to and including the present time, and the Treasurer of the United States in office on July 12, 1918, and each and every Treasurer of the United States since that date (including the Treasurer of the United States at the present time), must be deemed in justice and truth to have had on hand as the property belonging to the complainant the sum of $3,887.84 and interest thereon from July 12, 1918" (R. 16).

The defendants made a motion to dismiss on the ground of lack of jurisdiction (R. 17, 18), and this motion was granted by order dated October 4, 1934 (R. 19); the opinion of Judge Julian W. Mack (R. 20-23), stating that on the facts stated in the bill of complaint the court had no jurisdiction, because he construed Section 9-a of the Trading with the Enemy Act to allow the recovery only of moneys actually and physically held by the Alien Property Custodian or the Treasurer of the United States at the time of bringing suit. Judge Mack said:

> "It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and; as decided in *Henkels* v. *Sutherland*, 271 U. S. 298 (1925), any income therefrom actually received by the Government. It is not designed to charge the Government with liability for torts whether by the Alien Property Custodian or otherwise, and whether intentional or through a misconstruction of the law by such official" (R. 22).

He further said:

> "The exact question does not appear to have been decided in any of the cases that have been cited" (R. 22).

The last sentence of the opinion was—

> "The bill will be dismissed for want of jurisdiction" (R. 23).

POINT I

Section 9-a of the Trading with the Enemy Act should be construed liberally to give full and complete relief to American citizens whose property was illegally seized by the Alien Property Custodian.

The Trading with the Enemy Act was a necessary war statute for the successful prosecution of the World War. It is discussed in:

> *Central Union Trust Company* v. *Garvan*, 254 U. S. 554;
> *Stoehr* v. *Wallace*, 255 U. S. 239;
> *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457;
> *Henkels* v. *Sutherland*, 271 U. S. 298;
> *Woodson* v. *Deutsche Gold*, 292 U. S. 449;
> *Escher* v. *Woods*, 281 U. S. 379.

In *Central Union Trust Co.* v. *Garvan* (254 U. S. 554, 569), Mr. Justice Holmes said the Act gave the Custodian the *preliminary custody* of the property or authorized the *direct seizure* of the property

> "to make sure that it is forthcoming if finally condemned and *does no more*" (p. 569).

He further stated that the suspected alien-owned property should be transferred to the Alien Property Custodian, in any event, and the reservation of Section 9-a was necessary, for he said:

> "The reservation implies that mistakes may be made" (p. 568).

In the case of *Stoehr* v. *Wallace* (255 U. S. 239) it was held the statute was constitutional, Section 9 being referred to. Mr. Justice Van Devanter said (p. 246):

> "Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant *as of right*, to obtain a full hearing on his claim in a court *having power to enforce it if found meritorious.*" (Italics ours.)

In *Henkels* v. *Sutherland* (271 U. S. 298), where this Court held that American citizens must be paid in lieu of interest, whatever income had been derived from seized property, Mr. Justice Sutherland said (p. 301):

> "Whether the government shall pay interest upon its obligations depends upon congressional assent; but it *cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.*" (Italics ours.)

In the *Henkels* case this Court also held that while the United States might deal with enemy-owned property seized by the Custodian as it might see fit,

> "it has no such latitude in respect to the property of an American citizen" (271 U. S. 298, at p. 301).

The *Woodson* case (292 U. S. 449) held that in the case of the property of alien enemies there were *no constitutional restrictions* to the retaining of any reasonable amounts for overhead or other expenses.

In *Escher* v. *Woods* (281 U. S. 379) the broad principle was definitely established by Mr. Justice Holmes, although the actual point litigated was the right of the Government to make an arbitrary deduction of two per cent. of the property involved, on the ground that this fairly represented the cost of its administration and care. This Court held that the deduction was improper, and on the broad question, Mr. Justice Holmes said (p. 384):

> "But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian *is entitled to hold*. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner *whose interests were sacrificed up to the moment of restitution*. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm." See *Hobbs* v. *McLean*, 177 U. S. 567. (Italics ours.)

The courts have recognized that Section 9-a of the Trading with the Enemy Act must be liberally construed to do justice to American citizens.

Miller v. *Robertson*, 266 U. S. 243;
Von Schwerdtner v. *Piper*, 23 Fed. (2d) 862;
(D. C. Md.).

In *Miller* v. *Robertson*, *supra*, this Court construing this section, and the word "debt" said (p. 248):

> "The purpose of section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. *United States* v. *Anderson*, 9 Wall. 56, 65, 66; *United States* v. *Padelford*, 9 Wall. 531, 538. The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. *United States* v. *Freeman*, 3 How. 556, 565; *Danciger* v. *Cooley*, 248 U. S. 319, 326; *French* v. *Weeks*, 259 U. S. 326."

That Section 9 should be liberally construed to assist an American citizen, also appears from the fact that there have been many decisions that this section is the only remedy which can be had.

Upon the liberal interpretation contended for by petitioner, it is submitted that what was meant by the word "held" by the Treasurer of the United States or by the Alien Property Custodian in Section 9-a was not a mere physical holding, but what these officials should have held as alleged in the Thirty-second Paragraph of the Bill of Complaint.

This suit is one in equity, as required by the statute and equity considers done what should have been done.

Camp v. *Boyd*, 229 U. S. 330;
Independent Wireless Telegraph Co. v. *Radio Corporation*, 269 U. S. 459.

A fair and just interpretation of the statute was given by the Circuit Court of Appeals for the Ninth Circuit, in *Vowinckel* v. *Sutherland*, 24 Fed. (2d) 196, where the question before the Court was whether it was proper for the Alien Property Custodian to deduct from the principal of the fund improperly seized by him—

(1) The expenses of a Deputy Attorney General in going from Washington to San Francisco to argue the case against the complainant;

(2) Printing expenses of the Government on the appeal, and

(3) Other minor expenses.

The court considered Sections 9 and 24 of the Act, and held that the remedy of the person whose property was seized was to be full, complete and adequate; and the court held that the particular expenses were not proper, as they were not incurred in protecting or administering the trust. The court said (at p. 198):

"If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An innocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended.

Nor is this a just and reasonable construction of the statute."

The Court held that the deductions made by the Custodian were not authorized by law.

It is submitted that the reasoning in the case of *Escher* v. *Woods*, 281 U. S. 379, strongly supports the position of the complainant as the real intent of Section 9-a of the Trading with the Enemy Act; also the case of *Henkels* v. *Sutherland*, 271 U. S. 298.

It was claimed in the Circuit Court of Appeals by the United States Attorney that in the *Escher* case there were certain expenses allowed to be deducted. It does not appear what these items were, except that they were apparently incurred in the collection of income, and possibly the same charges that an American citizen would be required to pay in protecting or administering a similar trust. So far as appears, no dispute was raised as to the propriety of these small deductions.

In the *Henkels* case (298 Fed. 947, 948) the parties agreed as to what principal was due and there was no dispute as to certain deductions that had been made.

In this case it is important to remember that *all the net proceeds* of the property that was sold, first came to the Alien Property Custodian and was then paid out by him to the third parties, as stated in Paragraph Eleventh of the Bill of Complaint; and that none of the payments could properly have been incurred if the stock of this American corporation had not been improperly seized (Complaint, Par. Twelfth, R. 8).

The bald claim of the Government, so far sustained by the courts (R. 22) is that Section 9-a of the statute must be interpreted harshly and as if the "holding" applied to

the time of bringing suit or claim by the American citizen —*language not used in the statute*—so that the American citizen has no redress if his money has been spent, irrespective of the cause of the expenditure, the motives of the officials or the reason for the expenditure. It would authorize the confiscation of his money or property by officials acting for the United States in the following cases:

(a) When money paid to a representative of the Alien property office was stolen from him before it reached the Custodian.

(b) Where the representative was dishonest and stole the money himself, or lost it by speculating.

(c) Where the money was paid out for political advantage and to political favorites.

(d) Where, through neglect or favoritism, padded bills for alleged expenses were approved and filed.

(e) Where wholly unauthorized payments were made.

(f) Where the money or property was converted by the Alien Property Custodian, directly by him or his agents, or through ostensible payments, to third persons.

Many other examples could be offered.

It is respectfully urged that neither the history of the Act, as interpreted by the courts, nor its language permit of any such interpretation, and that if such would be the meaning of the Act, it would be clearly unconstiutional, as taking the property of an American citizen *without just compensation* in violation of the Fifth Amendment.

In the present case the petitioner (an American corporation) has so far been denied relief to recover merely

one-fourth of the proceeds of the sale of its property; on the theory that Section 9-a of the Trading with the Enemy Act only allows the recovery of moneys actually held by the government official at the time suit is brought, and that because the money was spent before 1922, when petitioner first brought suit (R. 8) petitioner has lost all remedy.

Section 9-a surely was not intended to mean that there must be a *time race* between the Alien Property Custodian and the American citizen; and that if the citizen did not bring suit *before the Custodian spent his money,* he could never get it back. This would put a premium on hasty and reckless assumption of authority by Government officials in matters of doubtful jurisdiction. It could also be a precedent for hasty Governmental usurpation and seizure of private property and property rights in other matters, under other statutes, where the right to act to the citizen's detriment was doubtful.

POINT II

Section 9-a of the Trading with the Enemy Act must be construed so as to make it constitutional, and not in violation of the Fifth Amendment.

It is well settled that statutes—especially acts of Congress—must be construed wherever possible to prevent their being held unconstitutional. This is also true when a grave constitutional doubt would arise if a claimed interpretation of an Act of Congress were made; while if the Act was interpreted otherwise, it would be admittedly constitutional.

Interstate Commerce Commission v. *Oregon, Wsahington R. & Nav. Co.*, 288 U. S. 14, 40;
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82;
United States v. *Standard Brewery, Inc.*, 251 U. S. 210, 220;
Russian Volunteer Fleet v. *U. S.*, 282 U. S. 481, 492;
United States v. *La Franca*, 282 U. S. 568, 574;
Blodgett v. *Holden*, 275 U. S. 142, 148;
Phelps v. *United States*, 274 U. S. 341, 344;
Richmond Screw & Anchor Co. v. *U. S.*, 275 U. S. 331, 346.

In *Russian Volunteer Fleet* v *United States*, 282 U. S. 481, this court said:

> "The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 471; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577."

If the statute is construed to give full relief where the American's property is improperly seized by giving him the full and fair value of his property, thus applying the law in cases of eminent domain by the United States or its officers under the Fifth Amendment, there would be no question of its constitutionality.

Cases involving the Fifth Amendment to the Constitution, and the necessity for full relief when a citizen's property is taken by the United States under Act of Congress or otherwise, have been referred to in a number of recent cases.

Olson v. *United States*, 292 U. S. 246;
Jacobs v. *United States*, 290 U. S. 13;
Perry v. *United States*, 55 S. Ct. 432;
Russian Volunteer Fleet v. *United States*, 282 U. S. 491;
Phelps v. *United States*, 274 U. S. 341, 344.

This Court in *Olson* v. *United States*, 292 U. S. 246, defined what compensation must be paid to a citizen of the United States, whose property was taken by the United States or federal officer.

Mr. Justice Butler there said (p. 255):

> "He is entitled to be put in as good a position pecuniarily as if his property had not been taken He must be made whole, but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions."

In *Lynch* v. *United States*, 292 U. S. 571, which dealt with the question of war risk insurance policies, Mr. Justice Brandeis stated:

> "The Fifth Amendment commands that property be not taken without making just compensation."

In *Jacobs* v. *United States*, 290 U. S. 13, the United States Government erected a dam in Alabama, under the authority of an Act of Congress, and this dam was alleged to have increased the flow of water on a complainant's land.

The amount of the damages were not seriously disputed, but the question arose as to the item of interest and the Circuit Court of Appeals held that the complainant was entitled to damages on the theory of implied contract only, and hence no interest could be allowed.

Mr. Chief Justice Hughes said (p. 16):

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States."

While the cases above cited refer to the taking of land, the Fifth Amendment equally applies to the taking of other property.

Russian Volunteer Fleet v. *United States*, 282 U. S. 481;
Phelps v. *United States*, 274 U. S. 341, 344.

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the Government took certain Russian ships during the late war; and the Russian corporation brought suit in the Court of Claims for compensation. The case was dismissed for want of jurisdiction (68 Ct. of Cl., 32), but this

Court reversed, holding that alien friends were entitled to the benefit and protection of the Fifth Amendment of the Federal Constitution.

In *Phelps* v. *United States*, 274 U. S. 341, 344 plaintiff's had a pier in New York harbor, which was taken by the Government during the war for use for war purposes. This court held that adequate compensation had not been given by the Court of Claims (61 Ct. of Cl., p. 1044), and said (p. 344):

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States, supra,* 304 (43 S. Ct. 354); *Brooks-Scanlon Corp* v. *United States,* 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States,* 274 U .S. 215."

It seems obvious that it is not just compensation to an American citizen or corporation for the Alien Property Custodian to wrongfully seize his property—here the $20,-

000 received as the *net proceeds* of the sale, and then pay out without the American's consent, $3,887.84 for expenses that would have been wholly unnecessary, if the Alien Property Custodian has simply *held the stock without selling it* until some court could pass upon the question of the right to make the seizure and sale.

The complainant feels that Section 9a was intended to give *complete* and not *partial* compensation, and that to hold that, the Alien Property Custodian could in good or bad faith pay out a large part of an American's money to third persons; and then say that Section 9-a of the Trading with the Enemy Act only required him to return to the citizen what part of the American's property, great or small, *that he had left*, would not be giving the American just compensation, and would be the clearest violation of the Fifth Amendment.

A private bailee or trustee who wrongfully takes or keeps the property of another is not entitled to be paid the expenses for a wrongful taking or keeping.

6 *Corpus Juris*, 1131;
Hobbs v. *M'Lean*, 117 U. S. 567;
United States v. *Todd Engineering Dry Dock & R. Co.*, 53 Fed. (2d) 1025; D. C. E. D. La.;
Matter of Hyde, 149 Misc. 291.

In 6 *Corpus Juris*, 1131, it was said:

> "No bailee, however, is entitled to reimbursement for expenses incurred by reason of his own negligence, misconduct or misuse of the property bailed."

In *Hobbs* v. *M'Lean* (117 U. S. 567), cited in *Escher* v. *Woods*, where Hobbs was the assignee of a contractor who

brought an action in the Court of Claims against the United States for damages, this court said:

> "But where one brings adversary proceedings to take possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.
>
> "The circuit court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others."

In *United States* v. *Todd Engineering Dry Dock & R. Co.*, 53 Fed. (2d) 1025; D. C. E. D. La., the court held that the repair company whose negligence caused a fire damage to a vessel, could not recover compensation for service of the salvage barge which it engaged. It was held that it had the duty to minimize damages occasioned through its negligent acts.

In *Matter of Hyde*, 149 Misc. 291, Surrogate Delehanty held that the executor (accountant-executor) who sold goods that did not belong to the estate, was not entitled to compensation for the expenses of the sale; and he was also denied commissions and counsel fee.

Almost daily, neglectful trustees are being surcharged for the expenditure of moneys of their trusts, at the instance of the beneficiaries; and there is no reason to apply any different rule in this case.

At the District Court argument Judge Mack suggested a distinction between the *Vowickel* case and *Escher* v.

Woods, supra, where the government officials were held to have *improperly retained* money belonging to the citizen, and the present case where the money was *improperly paid out.* Judge Mack said where the Government had improperly retained the moneys it was a matter of bookkeeping to give the appropriate relief, but he thought that Section 9 of the Statute required a different rule where the Government officials had paid out the money and no longer possessed it, even though the payment was wrongful.

It is submitted that there is no basis for the distinction, for if the citizen loses his property *in either way* it is equally within the Fifth Amendment.

This suit while nominally against government officials, was a suit against the United States:

Banco Mexicano v. *Deutsche Bank,* 263 U. S. 591;
Synthetic Patents Co. v. *Sutherland,* 22 Fed. (2d) 491; c. d. 276 U. S. 630.

The Government may allege that the United States as a sovereign cannot be sued without its consent:

Turner v. *United States,* 248 U. S. 354;
Morrison v. *Work,* 266 U. S. 481;
Lynch v. *United States,* 292 U. S. 571;
Perry v. *United States,* 55 S. Ct. 432, 435, 436.

In *Lynch* v. *United States,* 292 U. S. 571, however, this Court held that a right to sue the United States once given by statute can not be taken away without clear and explicit statement by Congress to that effect. It was held in that case that no withdrawal of the right to sue had been made.

The section of the Trading with the Enemy Act in question, while often amended has not been amended in the respects considered in this case; and there is no more reason to assume that Congress now intends to deprive an American citizen of his property than it did at the time of the Trading with the Enemy Act in 1917, when this Court said that Section 9-a, allowing correction of mistakes, was the main reason why the Act was constitutional.

POINT III.

The statute gives relief, notwithstanding former officials of the Government violated the rights of the American citizen.

It may be argued, as it was in the courts below, that the present acting Alien Property Custodian, Mr. Cummings, and the present Treasurer, Mr. Julian, had nothing whatever to do with the alleged wrongful acts in selling and disposing of petitioner's property, and that, therefore, they cannot be sued under the proper interpretation of Section 9-a of the Trading with the Enemy Act.

Section 780 of the Judicial Code of the United States (28 U. S. C. A. Sec. 780) was held by this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, to permit a cause of action against one official to be continued against the new official after the resignation or death of the first one.

It presupposes a continuity of liability for questioned action by governmental officials. In actions under the Trading with the Enemy Act, if the opposite rule were the case and the accident of death or resignation of one government official who had improperly dealt with the property of

an American citizen would prevent all redress in a suit against the new official, a great injustice would result.

It follows that under the *Fix* case, the suit against the present Custodian and the present Treasurer, has power to determine the propriety and legality of acts of former custodians and former treasurers; and it is no defense that the present respondents while in office performed no acts that injured the rights of the petitioner.

The Writ of Certiorari Should Be Granted

Respectfully submitted,

TOWNSEND & KINDLEBERGER,
Solicitors for Petitioner.

E. CROSBY KINDLEBERGER,
Of Counsel.

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Office Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1935. No. 13.

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States, in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

TOWNSEND & KINDLEBERGER,
Solicitors for Petitioner.

E. CROSBY KINDLEBERGER,
Of Counsel.

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The decree dismissing this case for want of jurisdiction should be reversed; and there being no question of fact in the case, a decree should be made ordering the Alien Property Custodian and/or Treasurer of the United States to pay to the petitioner $3,887.84, with interest from February 20, 1919, the day of sale of petitioner's stock; or in any event, a new trial should be had.. 36

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Supreme Court of the United States

OCTOBER TERM, 1935. No. 13.

BECKER STEEL COMPANY OF AMERICA,
Petitioner,

against

HOMER S. CUMMINGS, Attorney General of the United States, in his official capacity as Alien Property Custodian, and WILLIAM A. JULIAN, as Treasurer of the United States,
Respondents.

BRIEF FOR PETITIONER.

This Court on April 29, 1935 (294 U. S. ; 55 S. C. 657; R. 19), granted a writ of certiorari to review the decision of the Circuit Court of Appeals, Second Circuit (75 Fed. 2d 1005), affirming on the opinion rendered by Circuit Judge Julian W. Mack (10 Fed. Supp. 343; R. 13-15) the decision of the United States District Court, Southern District of New York, which dismissed, for want of jurisdiction, suit brought by the petitioner against the respondents. (R. 13).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the Judicial Code Sec. 240, as amended by the Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938; 28 U. S. C. A., Sec. 347 (a).

The Single Question Presented.

On this short record, involving a small amount of money, is presented an important question of the construction of Section 9 (a) of the Trading With the Enemy Act (Act of October 6, 1917, Chap. 106; 40 Stat. 411).

Section 9 (a) of the Act gives the remedy of suit to an American owner whose property has been mistakenly and wrongfully seized and held by the Alien Property Custodian or the Treasurer of the United States.

The question is should this remedy be construed to require a mere return of *a portion* of the net proceeds of the wrongful sale, and a loss of almost one-quarter of the net proceeds of the wrongful sale paid out to third persons; or do the statute and the Fifth Amendment require the return to the American owner of all the principal of his property or its proceeds?

A strained meaning of the words "held by the Alien Property Custodian" was adopted by Judge Mack in the Courts below (10 Fed. Supp. 343; R. 15), while the petitioner claims that Section 9 (a) must be construed liberally, and that the construction put upon it by the courts below would make it unconstitutional, as depriving an American citizen of his property without due process of law, under the Fifth Amendment. Petitioner further claims that the statute was not intended to require a *time race* between the Alien Property Custodian and the American owner of property, by which one American citizen might lose all or part of his property if the Alien Property Custodian was quick enough to sell his property before he could consult counsel and bring a suit for its recovery, while some other citizen, similarly situated, who had alert counsel under retainer, and acted before the Alien Property Custodian could ap-

prove any voucher payments, would be able to recover all of his property. The petitioner further claims that the reasoning of this Court in *Escher* v. *Woods*, 281 U. S. 379, demands that the American owner, in every case of wrongful seizure of his property, should receive full and complete relief, under Section 9 (a) of the Act, and be put in the same position as if the seizure had never taken place, just as is the case where the Government seizes other property of American owners under power of eminent domain.

Finally, petitioner claims that the Alien Property Custodian, when making the sale of its stock, acted as a *quasi* trustee, and should not be permitted to charge the American owner with expenses solely incurred by him in the wrongful sale of the American's stock.

Statute Involved.

In addition to the Fifth Amendment of the Constitution of the United States, this case involves the construction of Section 9-a of the Trading With the Enemy Act, which reads as follows:

> "Section 9. *Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.* (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him

hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the cus-

tody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." (Act of Oct. 6, 1917, chap. 106, 40 Stat. 411.)

The Facts.

The courts below have held that on the facts stated in the bill of complaint, which are admitted on the motion of respondents to dismiss (*Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489), the proper construction of Section 9 (a) of the Trading With the Enemy Act gave no jurisdiction to the District Court to render a decree for the complainant-petitioner. The courts below, without considering the merits, denied a decree which petitioner sought, requiring the Attorney General, as the Acting Alien Property Custodian, or the Treasurer of the United States, to pay and deliver to the petitioner the sum of $3,887.84, which it alleges had first been collected from the wrongful sale of the petitioner's property and afterwards paid out to third persons for fees and charges not connected with the protection of the trust or its administration, and solely occasioned by the wrongful sale of stock of petitioner, an American corporation, which had been adjudicated not to have been *"enemy-owned"*.

The bill of complaint, after referring to the complainant having been a West Virginia corporation (R. 2), and

that the respondents were Acting Alien Property Custodian and Treasurer of the United States, respectively (R. 3), and that the suit was brought under the Trading With the Enemy Act (R. 3), alleges that on February 9, 1917, A. Mitchell Palmer, then Alien Property Custodian, seized 5,000 shares of stock belonging to the petitioner, as being enemy-owned, and caused them to be reissued to himself (R. 3-4); that 2,500 shares of this stock were ordered returned to the petitioner by the United States District Court for the Southern District of West Virginia (R. 4), and that the remaining 2,500 shares seized by the Alien Property Custodian were sold by him on February 20, 1919, for the sum of $20,000; which sum was received and turned over by him to the then Treasurer of the United States (R. 4); that these shares so sold belonged to the petitioner as its sole property, and were unlawfully seized, and converted and sold, by said Palmer, as Alien Property Custodian, and were of the full value of $20,000, and that the proceeds of said sale and interest thereon at all times belonged to the complainant-petitioner (R. 4).

In paragraph Eleventh of the complaint it is alleged that from the $20,000 proceeds of said sale of said stock unlawfully sold, the then Alien Property Custodian, without knowledge or consent of the complainant, paid out from the *principal* of the fund so received to third persons named in the bill of complaint eleven specified items, aggregating $3,887.84—

> "that all of said payments were for advertising and printing of a catalog of the unlawful sale of said stock; for legal services in connection with said unlawful sale, and for other expenses directly due to the making of said sale" (Par. Eleventh, R. 5).

The Twelfth paragraph of the bill alleged that these unlawful payments by the Alien Property Custodian and the Treasurer of the United States were made from the principal amount received on the unlawful and improper sale of the stock, and not from the income or other property of the complainant; and that none of the payments made to third persons, were in connection with the preservation of the property or its care—

> "and none of them could properly have been incurred, if said 2,500 shares of stock had not been improperly and illegally sold, as hereinbefore set forth" (Par. Twelfth, R. 5).

The making of the claim for $20,000, the proceeds of the unlawful sale of the complainant's stock under Section 9 (a) of the Trading With the Enemy Act was alleged (Par. Thirteenth); the bringing of suit under Section 9 and its trial in Par. Fourteenth (R. 5-6); the decree made by U. S. District Judge Augustus N. Hand, dated August 21, 1925, adjudged the sale illegal, because the stock belonged to the complainant, a West Virginia corporation, and

> "was not subject to seizure and sale as the property of an enemy alien";

and directing that the $20,000 be returned (R. 6).

Subsequent paragraphs of the bill refer to complainant's attempt to collect the $20,000 due it; the refusal of the Government officials to pay the entire amount; $16,112.16 being all the money claimed to have remained in the alleged trust (Par. Sixteenth, R. 7); the circumstances of the payment of the $1,112.16 and the claim by complainant that such circumstances constituted duress in law (Pars. Seventeenth, Eighteenth and Nineteenth; R. 7).

Then follow allegations of the subsequent claim by complainant for interest under authority of *Henkels* v. *Sutherland,* 271 U. S. 298 (Pars. Twentieth—Twenty-second, R. 8); the decision of this Court in *Escher* v. *Woods,* 281 U. S. 379 (Par. Twenty-third, R. 8 and 9); previous attempts to secure payment of the $3,887.84; and denial of relief on the ground that the suit had abated (Pars. Twenty-fourth to Twenty-ninth, R. 9-10); the decision of this Court in *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530 (R. 10); the resubmission of the claim to the Attorney General of the United States in February 1934, and his refusal to make payment (Pars. Thirtieth and Thirty-first, R. 10 and 11). Then follows this allegation:

> "Thirty-second: On information and belief, by reason of the foregoing facts, Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and each and every officer holding said position as Alien Property Custodian from July 12, 1918, up to and including the present time, and the Treasurer of the United States in office on July 12, 1918, and each and every Treasurer of the United States since that date (including the Treasurer of the United States at the present time), must be deemed in justice and truth to have had on hand as the property belonging to the complainant the sum of $3,887.84 and interest thereon from July 12, 1918" (R. 11).

The respondents made a motion to dismiss on the ground of lack of jurisdiction (R. 12), and this motion was granted (R. 13); the opinion of Circuit Judge Julian W. Mack (10 Fed. Supp. 343; R. 13-15), stating that on the facts stated in the bill of complaint the court had no jurisdiction, because he construed Section 9 (a) of the Trading With the Enemy Act to allow the recovery only of moneys *actually*

and physically and not constructively held by the Alien Property Custodian or the Treasurer of the United States *at the time of bringing suit.* Judge Mack said:

> "It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and, as decided in *Henkels* v. *Sutherland,* 271 U. S. 298 (1925), any income therefrom actually received by the Government. It is not designed to charge the Government with liability for torts whether by the Alien Property Custodian or otherwise, and whether intentional or through a misconstruction of the law by such official" (R. 15).

He further said:

> "The exact question does not appear to have been decided in any of the cases that have been cited" (R. 14).

The last sentence of the opinion was—

> "The bill will be dismissed for want of jurisdiction" (R. 15).

The Circuit Court of Appeals adopted the opinion of Judge Mack (75 Fed. 2d 1005; R. 18).

Assignments of Error.

In the Circuit Court of Appeals the petitioner specified five assignments of error (R. 17), which bring up all of the questions covered by the argument, and need not be repeated here.

ARGUMENT.

POINT I.

Section 9 (*a*) of the Trading With the Enemy Act, and the Fifth Amendment, require full and not partial return of an American's property, or its proceeds, when it was mistakenly seized and sold by the Alien Property Custodian.

It may be of assistance to the Court to consider this Point, under the following sub-heads:

(a) The purpose of the Trading With the Enemy Act.

(b) Section 9 (a) of the Act was intended to give protection to all persons who were not enemy aliens.

(c) Section 9 (a) of the Act should receive a liberal construction.

(d) The mistaken or unwarranted interference with an American's property should be measured by the rules applicable to trustees and trust estates.

(e) Where an American's property has been taken, even in times of war, by Government officials, there is an implied agreement, required by the Fifth Amendment, that the citizen should be compensated for the reasonable value of the property taken, as of the time of the taking.

(*a*) The purpose of the Trading With the Enemy Act.

When the World War broke out it was realized by Congress that many Germans were conducting business in the United States, either individually or through partnerships,

or through American-formed corporations whose stock was owned by Germans. It was realized that the successful prosecution of the war required the temporary seizure of all such German-owned property or stock; and accordingly the Trading With the Enemy statute was enacted. Congress realized that in many instances it would be difficult and time wasting to determine whether the property or the stock was in fact enemy-owned, so the statute provided that the Alien Property Custodian, charged with the administration of the new Act, was entitled to immediate temporary possession of the property or stock in every instance, without judicial interference, leaving it to the Courts to decree the giving back of property or stock when improperly or mistakenly seized because belonging to Americans or friendly aliens. Section 9 (a) was placed in the statute, allowing claims to be made for the return of property, or, if sold, the proceeds of property, claimed to belong to Americans or friendly aliens, and a judicial review in equity in a Federal Court. This section was held in the first cases that reached this Court to be sufficient to make the entire Act constitutional, and not violative of the Fifth Amendment.

Central Union Trust Co. v. *Garvan,* 254 U. S. 554;
Stoehr v. *Wallace,* 255 U. S. 239;
Commercial Trust Co. v. *Miller,* 262 U. S. 51.

In *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 569, Mr. Justice Holmes held the Act gave the Custodian the preliminary custody of the property or authorized its direct seizure

> "to make sure that it is forthcoming if finally condemned and does no more."

He said that Sections 9 and 7 of the Act presumed that property would be held by the Custodian until after the claim for its return was decided. At page 566 Mr. Justice Holmes stated:

> "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake."

At page 568 he said that Section 9 of the Act implied that mistakes might be made.

In *Stoehr* v. *Wallace*, 255 U. S. 239, the Trading With the Enemy Act was held constitutional on account of the presence of Section 9. Mr. Justice Van Devanter said (at p. 245):

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co.* v. *Garvan, supra.*"

He also said, at page 246:

> "Thus there is provision for the return of property mistakenly sequestrated; and we have no hesitation in pronouncing it adequate, for it enables the claimants *as of right* to obtain a full hearing on his claim in a court *having power to enforce it if found meritorious.*" (Italics ours.)

(b) Section 9 (a) of the Act was intended to give protection to all persons who were not enemy aliens.

There is a great distinction in the Act, as interpreted by this Court, between property belonging to enemy aliens, on the one hand, and that owned by American citizens or friendly aliens, on the other. In *Woodson* v. *Deutsche Gold*, 292 U. S. 449, Mr. Justice Butler, writing for this Court, held that there was no constitutional objection to the seizure of property or stock of enemy aliens, and the indefinite holding of them until such time as Congress should decide upon their disposition.

Moreover, it was held that Congress in enacting its Independent Offices Appropriation Act, passed March 28, 1934, had withdrawn its consent for former enemy aliens to file any claim or suit against the Alien Property Custodian, or Treasurer of the United States, such suits being in effect brought against the United States.

Banco Mexicano v. *Deutsche Bank*, 263 U. S. 591;
Miller v. *Robertson*, 266 U. S. 243, 257.
Synthetic Patents Co. v. *Sutherland*, 22 Fed. 2d 491; C. D. 276 U. S. 630.

A far different rule is applicable to the claims of American citizens, when their property was mistakenly or wrongfully seized by the Alien Property Custodian. In such case the decisions have been uniform, that Congress did not, and could not, authorize the appropriation of an American's property without due compensation, and that Section 9 was intended to give full relief by the return of all of the property seized; or its proceeds, in the case of sale.

Behn, Meyer & Co. v. *Miller*, 266 U. S. 457;
Henkels v. *Sutherland*, 271 U. S. 298;
Great Northern Railroad v. *Sutherland*, 273 U. S. 182, 194;
Escher v. *Woods*, 281 U. S. 379;
Vowinckel v. *Sutherland*, 24 Fed. 2d 196; C. C. A. 9;
Sielken-Schwarz v. *American Factors*, 60 Fed. 2d 43; C. C. A. 2; C. D. 287 U. S. 654.

In *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, Mr. Justice McReynolds referred to the constitutionality of the Act, and the provisions of Section 9, as giving full relief in case of a mistake; and held that the mere fact that some of the stockholders of the corporation may have been enemy aliens, was no warrant for the Custodian seizing the entire property of the corporation, which had been formed under the laws of a British Colony. This Court accordingly reversed the dismissal by the District of Columbia courts in a suit brought by the corporation for the return of its property.

In *Henkels* v. *Sutherland*, 271 U. S. 298, the main question presented to this Court was the right of an American citizen to receive interest on bonds of the United States Government, where the American's property had been seized and sold, and the proceeds invested in these bonds. The case involved a large amount of money, and at first there was dispute over what was the principal amount which should be returned to Henkels on account of the mistaken seizure of his 2,298 shares of common stock of International Textile, Inc., which had been seized as enemy-owned, and sold, and the proceeds deposited in the United States Treasury. It appears in that record that on July 6,

1921, Judge Hough, in the District Court in New York, had determined that the stock belonged to Henkels, who was an American citizen and a resident of New York City and State, and the Treasurer of the United States was directed to account for and pay over to Henkels

> "the proceeds of the sale of the said 2,298 shares of common stock of International Textile, Inc." (R. 22).

The affidavit of the counsel for Henkels (R. 16) stated that the seizure of the stock had been wrongful; and then said:

> "regardless of the deduction of the expenses of sale and costs of administration (*which we were willing to waive*), complainant was entitled by the terms of the decree itself to an accounting for any income or interest earned on the principal." (Italics ours.)

At page 19 of the record it appears that the expenses of the sale, whose gross proceeds were over a million and a half dollars, were less than $13,000, and that there was a further charge of $2,500; and there was no claim for the return of these comparatively small amounts, and the amount of the principal to be returned to Henkels after crediting payments on account was agreed upon by counsel to be $873,776.28.

In this Court counsel for Henkels argued that the Fifth Amendment forbade the taking of Henkels's property, and that Section 9 of the Trading With the Enemy Act was intended to give full relief. The Solicitor General, in attempting to answer this argument, said in his brief:

> "It is further asserted that unless interest is paid by the United States upon the present claim the Fifth Amendment of the Constitution is being vio-

lated in that just compensation for the taking is not being fully made. This argument is manifestly fallacious. The United States did not take the property of the plaintiff under any theory of condemnation. It was taken as a war measure under the mistaken belief that it was the property of an enemy. The taking by the United States was under a claim of right, adverse to the owner, *and tortious.* If a statute is not present to permit the taking in condemnation proceedings by the United States the act of taking becomes *merely a trespass by the individual* who assumed to act for the United States." (Italics ours.)

It will be noted that this is the same argument adopted by Judge Mack in his opinion in this case (R. 15).

Mr. Justice Sutherland said (at p. 300):

> "No question is made in respect of the right of the Custodian to seize property supposed to belong to an enemy, although it may subsequently turn out to have been a mistake, adequate provision having been made for a return in that case."

Mr. Justice Sutherland later said (p. 301):

> "By the clear import of the statute, claimant's rights in respect of such proceeds are not inferior to his rights in respect of the original property,
>
> * * * * * * *
>
> "With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit, *White* v. *Mechanics' Securities Corporation,* 269 U. S. 283; but it has no such latitude in respect of the property of an American citizen. Whether the government shall pay interest upon its obligations depends upon congressional assent; but

> it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution."

The opinion then took up the argument of the Government that the case of *Angarica* v. *Bayard*, 127 U. S. 251, forbade the Government paying anyone interest on its own bonds when the Government retained possession of the bonds. This Court questioned the general application of such rule; and Mr. Justice Sutherland then said (p. 302):

> "Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized, and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received, which morally and equitably belongs to them as plainly as though they had themselves made the investment."

In *Great Northern Railway Co.* v. *Sutherland*, 273 U. S. 182, Mr. Justice Brandeis said (at p. 194), referring to the Trading With the Enemy Act:

> "Protection to the rights of owners other than enemies was provided for by Section 9."

In *Escher* v. *Woods*, 281 U. S. 379, plaintiff, Sigg-Fehr, was a Swiss citizen, and stock owned by him in an Ameri-

can corporation had been seized; but the Court, upon his making claim for the proceeds, ordered the money returned to him. It was returned after deducting $55,909.83 for alleged administration expenses, the amount being exactly two per cent. of the principal amount involved. An order to show cause was then obtained why the $55,909.83 should not also be returned; while the suit was pending Sigg-Fehr died, and Escher, his administrator, was substituted as plaintiff. The Court of Appeals, reversing the Supreme Court of the District of Columbia, held that while a mistake had been made in seizing the property, the seizure was not so unfair and unreasonable as to fall within the condemnation of equity, and to be arbitrary or fraudulent (*Tate* v. *Escher,* 33 Fed. 2d 556). That Court stated that Section 24 provided for the payment from funds in the Custodian's hands of charges for collection and protection of the property, and that these charges were reasonable under the general rules of administration of trusts (33 Fed. 2d 556, 559). This Court reversed, Mr. Justice Holmes writing the opinion. He referred to the provisions of the Trading With the Enemy Act, particularly Sections 9 and 24; and said (at p. 384):

> "It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, *a charge upon the corpus of the fund.*" (Italics ours.)

And then said (p. 384):

> "But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian *is entitled to hold.* It would be extraordinary if the charges incident to a seizure

> that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner *whose interests were sacrificed up to the moment of restitution.* It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean,* 117 U. S. 567." (Italics ours.)

The Solicitor General may possibly urge that the language just quoted was dictum, in that the only actual point litigated was whether an arbitrary deduction of two per cent. could be made without proof that this was a fair approximation of the cost of the administration and care of the property. An examination of the brief of *Escher* in this Court, however, shows that the case was argued on the broad general grounds referred to in Mr. Justice Holmes's opinion, to wit: that it was improper and unconstitutional to confiscate any part of the principal of the property of an American citizen or a friendly alien. No claim was made by Escher's brief that a "collection" charge of about $1,000 and a large amount for income taxes were not proper charges.

In *Vowinckel* v. *Sutherland,* 24 Fed. 2d 196; C. C. A. 9, Dr. Vowinckel, the complainant, was born in Germany, but had long been a resident of California, where he practised medicine; and he brought suit to get back his property, which had been seized by the Alien Property Custodian. It seems that he had applied for citizenship papers, but before they could be granted had volunteered for Red Cross duty with the German army. He was held entitled to a return of his property on the ground that he was not an enemy alien (10 Fed. 2d 19; 15 Fed. 2d 872). The

Alien Property Custodian then returned all of his property but $759.09, which the Government claimed had been spent, made up as follows:

(a) Trip of Assistant Attorney General to California from Washington to argue case in Circuit Court of Appeals.....	$617.99
(b) Government Printing Office, for appeal printing	94.90
(c) Department of Justice expenses.....	46.20
	$759.09

The District Court denied relief, but the Circuit Court of Appeals reversed, and ordered the return of the $759.09.

The Government brief before the Circuit Court of Appeals argued, as was contended in the courts below in this case, that the suit against the Alien Property Custodian under Section 9 was in reality a suit against the United States, that the $759.09 *had been spent, and the Government did not have it* (Brief, p. 3), and that the Act provided that recovery could be had only for what the Alien Property Custodian *held at the time of bringing suit.* These contentions of the Government were not followed by the Circuit Court of Appeals, which considered Sections 9 and 24 of the Act, and held that the remedy of an American whose property was seized was to be full, complete and adequate; and the court held that the particular expenses were not proper, as they were not incurred in protecting or administering the trust. The Court said (at p. 198):

> "If the Custodian is authorized to make the deductions here complained of, the remedy of the injured party is not complete and adequate. An in-

> nocent party is deprived of the use of his property by the acts of the government until the termination of a suit to recover it, and to then deduct the expenses incurred by the Department of Justice in an unsuccessful defense against the claim would work a grave injustice, such as Congress never intended. Nor is this a just and reasonable construction of the statute."

In *Sielken-Schwarz* v. *American Factors,* 60 Fed. 2d 43; C. C. A. 2; C. D. 287 U. S. 654, the question was as to the right of the Alien Property Custodian to vote whether a conveyance of property of the corporation should be made. The conveyance required the unanimous consent of all the stockholders, the Alien Property Custodian having improperly seized the stock of the complainant as enemy-owned. It was held that he had a right to vote; but Judge Learned Hand said (at p. 44):

> "The argument is that as the seizure was wrongful, it could confer no such power; that the Trading With the Enemy Act (50 U. S. C. A. Appendix, Sec. 1, *et seq.*) did not authorize the sale of non-enemy property, and it would not have been constitutional if it had. We may take it so. The power to seize, granted by section 7 (c) of the act (50 U. S. C. A. Appendix Sec. 7 (c), and note), was merely to gain possession, and for this reason the issue whether the property was enemy held, could be taken from the courts, and left with the Custodian. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51."

And again he said (p. 45):

> "As to its validity, it is not necessary to say whether Congress could have authorized the sale of

a citizen's property, merely by giving him a claim to the proceeds. That might be too far to go merely to avoid difficulties of administration; though even this is perhaps not wholly free from doubt, for much may be done, which is in fact in excess of a power, if it be essential to its effective exercise. At any rate we assume the issue arguendo with the plaintiffs. Congress made no such effort; it provided a complete remedy to the citizen whose property had been wrongly seized. He must surrender possession to be sure, but under section 9 of the act (50 U. S. C. A. Appendix Sec. 9) he might at once file a notice with the Custodian reclaiming his property."

(c) Section 9 (a) of the Act should receive a liberal construction.

Behn, Meyer & Co. v. *Miller,* 266 U. S. 457;
Miller v. *Robertson,* 266 U. S. 243, 248.

In *Miller* v. *Robertson, supra,* this Court said (p. 248):

"The purpose of section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. *United States* v. *Anderson,* 9 Wall. 56, 65, 66; *United States* v. *Padelford,* 9 Wall. 531, 538. The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. *United States* v. *Freeman,* 3 How. 556, 565; *Danciger* v. *Cooley,* 248 U. S. 319, 326; *French* v. *Weeks,* 259 U. S. 326, 328."

(*d*) The mistaken or unwarranted interference with an American's property should be measured by the rules applicable to trustees and trust estates.

In *Commissioner of Internal Revenue* v. *Stearns,* 65 Fed. 2d 371; C. D. 290 U. S. 670, it was stated that the Alien Property Custodian had the powers of a common-law trustee, without beneficial interest in the property that was seized. Mr. Justice Holmes in *Escher* v. *Woods,* 281 U. S. 379 cited as authority the case of *Hobbs* v. *McLean,* 117 U. S. 567. In that case Hobbs was the assignee in bankruptcy of one Peck, a contractor for United States Government work, and he had brought suit in the Court of Claims. McLean was the administrator of Peck, and he urged that he was entitled to compensation, although instead of aiding the plaintiffs he had obstructed them in the Court of Claims litigation. The Court referred to the rule that all persons helping to create or preserve a fund might be entitled to compensation, under the rule of *Trustees* v. *Greenough,* 105 U. S. 527. The Court then said (p. 582):

> "But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.
>
> "The circuit court was right in not compelling the plaintiffs to pay for services rendered and expenses incurred in a proceeding adversary to their interest, and carried on for the benefit of others."

Other cases which have referred to the rule are:

McCourt v. *Singers-Bigger*, 145 Fed. 103, 114; C. C. A. 8;
Gillespie v. *J. C. Piles & Co.*, 178 Fed. 886; C. C. A. 8.

In *Gillespie* v. *J. C. Piles Co.*, *supra*, Judge Sanborn said, at page 892:

> "There is a manifest injustice and inequity in taking out of a fund or property in the custody of a court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its custody and pay compensation for the services of an attorney of a trustee or for the services of any other party by means of which the fund or property has been taken or detained from its equitable owner. *Hobbs* v. *McLean*, 117 U. S. 567, 581."

(e) Where an American's property has been taken, even in times of war, by Government officials, there is an implied agreement, required by the Fifth Amendment, that the citizen should be compensated for the reasonable value of the property taken, as of the time of the taking.

The Fifth Amendment, restraining Congress from interfering with the property rights of American citizens, and preventing the Government from confiscating such rights without just compensation, has been referred to in

many cases: some of them arising from conditions in the World War.

United States v. *Lynah*, 188 U. S. 445, 471;
Olson v. *United States*, 292 U. S. 246, 255;
Jacobs v. *United States*, 290 U. S. 13, 16;
Perry v. *United States*, 294 U. S. 330;
Brooks-Scanlon v. *United States*, 265 U. S. 106, 123;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481;
Phelps v. *United States*, 274 U. S. 341, 344;
West v. *Chesapeake & Potomac Telephone Co.*, 55 S. C. 894;
Louisville Joint Stock Land Bank v. *Radford*, 55 S. C. 854, 869;
Railroad Retirement Board v. *Alton Railroad Co.*, 55 S. C. 758.

This Court in *Olson* v. *United States*, 292 U. S. 246, defined what compensation must be paid to a citizen of the United States, whose property was taken by the United States or Federal officer.

Mr. Justice Butler there said (p. 255):

> "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions."

In *Lynch* v. *United States*, 292 U. S. 571, which dealt with the question of war risk insurance policies, Mr. Justice Brandeis stated (p. 579):

> "The Fifth Amendment commands that property be not taken without making just compensation."

In *Jacobs* v. *United States*, 290 U. S. 13, the United States Government erected a dam in Alabama, under the authority of an Act of Congress, and this dam was alleged to have increased the flow of water on a complainant's land. The amount of the damages was not seriousiy disputed, but the question arose as to the item of interest and the Circuit Court of Appeals held that the complainant was entitled to damages on the theory of implied contract only, and hence no interest could be allowed.

Mr. Chief Justice Hughes said (p. 16):

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States."

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the Government took certain Russian ships during the late war; and the Russian corporation brought suit in the Court of Claims for compensation. The case was dismissed for want of jurisdiction (68 Ct. of Cl., 32), but this Court

reversed, holding that alien friends were entitled to the benefit and protection of the Fifth Amendment of the Federal Constitution.

In *Phelps* v. *United States*, 274 U. S. 341, 344, plaintiffs had a pier in New York harbor, which was taken by the Government during the war for use for war purposes. This Court held that adequate compensation had not been given by the Court of Claims (61 Ct. of Cl., p. 1044), and Mr. Justice Butler said (p. 344):

> "Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States, supra,* 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215."

It seems obvious that it is not just compensation to an American citizen or corporation when the Alien Property Custodian has wrongfully seized and sold his property, received $20,000 as the *net proceeds* of the sale, and then paid

out, without the American's consent, $3,887.84, almost one-fourth of such proceeds, for expenses that would have been wholly unnecessary, if the Alien Property Custodian has simply *held the stock without selling it* until some court could pass upon the question of the right to make the seizure and sale.

The complainant feels that Section 9 (a) was intended to give *complete* and not *partial* compensation, and that to hold that the Alien Property Custodian could in good or bad faith pay out a large part of an American's money to third persons; and then say that Section 9 (a) of the Trading With the Enemy Act only required him to return to the citizen what part of the American's property, great or small, *that he had left,* after the Alien Property Custodian had been *more generous than just* in paying out petitioner's money, would not be giving the American just compensation, and would be the clearest violation of the Fifth Amendment.

POINT II.

Section 9 (a) of the Trading With the Enemy Act must be construed so as to make it constitutional, and not in violation of the Fifth Amendment.

It is well settled that statutes—especially acts of Congress—must be construed wherever possible to prevent their being held unconstitutional. This is also true when a grave constitutional doubt would arise if a claimed interpretation of an Act of Congress were made; while if the

Act was interpreted otherwise, it would be admittedly constitutional.

Interstate Commerce Commission v. *Oregon, Washington R. & Nav. Co.*, 288 U. S. 14, 40;
United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83;
United States v. *Standard Brewery, Inc.*, 251 U. S. 210, 220;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481, 492;
United States v. *LaFranca*, 282 U. S. 568, 574;
Blodgett v. *Holden*, 275 U. S. 142, 148;
Phelps v. *United States*, 274 U. S. 341, 344;
Richmond Screw & Anchor Co. v. *United States*, 275 U. S. 331, 346;
Sielcken-Schwarz v. *American Factors*, 60 Fed. 2d 43, 45; C. C. A. 2; C. D. 287 U. S. 654;
George Moore Ice Cream Co. v. *Rose*, 289 U. S. 373, 379;
Crowell v. *Benson*, 285 U. S. 22, 62.

Mr. Chief Justice Hughes in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (p. 492) said:

> "The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 471; *Blod-*

> *gett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Lucas* v. *Alexander*, 279 U. S. 573, 577."

If the statute is construed to give full relief where the American's property is improperly seized by giving him the full and fair value of his property, under the Fifth Amendment, there would be no question of its constitutionality.

It is certainly not just compensation to turn over to the American citizen *only a part* of the proceeds of the wrongful sale of his property. To construe the statute to permit the Alien Property Custodian to be more than generous to attorneys, accountants and others by paying out nearly one-quarter of the net proceeds which he received from the sale of an American's stock, is not putting the American citizen or corporation

> "in as good a position pecuniarily as if his property had not been taken." (*Olson* v. *United States*, 292 U. S. 246, 255.)

The Alien Property Custodian would have done his full duty if he had held the stock without selling it until some court could pass upon the question of the right to make the seizure and sale, especially when he knew that the petitioner claimed that the seizure was wrongful. If the statute is construed to require the complete restoration to the petitioner of all of the net proceeds of the sale of the principal of his property, then there can be no question of its constitutionality under the Fifth Amendment.

POINT III.

The construction placed upon the provisions of Section 9 (*a*) of the Trading With the Enemy Act by the courts below, is forced, unfair and inequitable.

The Circuit Court of Appeals of the Ninth Circuit, in *Vowinckel* v. *Sutherland,* 24 Fed. 2d 196, held that Congress never intended to deduct, as alleged expenses of the Alien Property Custodian, any part of the principal of an American's property, and did not adopt the contentions of the Attorney General that the statute allowed the return of only what was held at the time of bringing suit, and that the moneys in question had already been spent. The courts below, in *our* case, have construed Section 9 (a), and especially that part of the section which authorizes the court to order the payment to the claimant

> "of the money or other property so *held* by the Alien Property Custodian or by the Treasurer of the United States",

to mean that the American had a remedy

> "against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States" (R. 15; 10 Fed. Supp. 343, 344).

Judge Mack's opinion makes the statute read as if Congress had inserted after the words

> "held by the Alien Property Custodian",

the further words, *not in the statute,*

> "at the very moment the suit was instituted."

There is no time limitation in the statute, Congress evidently realizing that claimants might not know the facts or their rights for a period of months or years. Congress evidently did not intend that there should be a *time race* between the American citizen and the Alien Property Custodian, so that if the Custodian should succeed by a few days or hours in selling the property before a claim was made or suit brought, all relief would be barred to the American citizen. The more natural construction of the Act is, that the word *"held"* meant *"held at any time"*, or which the Custodian "should have held", and that improper payments or improper disposition of the principal of the American's property would be no excuse or defense when the American sought to have his property or its proceeds restored to him.

The harsh interpretation of the statute adopted by the courts below (R. 15) would authorize the confiscation of an American's property or money by officials of the United States in the following cases:

(a) When money paid to a representative of the Alien Property office was stolen from him before it reached the Custodian.

(b) Where the representative was dishonest and stole the money himself, or lost it by speculating.

(c) Where the money was paid out for political advantage and to political favorites.

(d) Where, through neglect or favoritism or undue "generosity", padded bills for alleged expenses were approved and filed.

(e) Where wholly unauthorized payments were made.

(f) Where the money or property was converted by the Alien Property Custodian, directly by him or his agents, or through ostensible payments, to third persons.

Many other examples could be offered.

The Government may urge that Judge Mack's construction of the statute is proper in that:

(1) The expenses of the sale were deductible under Section 24 of the Act.

The *Escher* case (*Escher* v. *Woods*, 281 U. S. 379) stated that Section 24 applied only to deductions from income and not from principal, for administration expenses and those incurred in the care of the property. Here the "expenses" were not of this character and no expenses need have been incurred at all if the wrongful sale had not been made (R. 5).

(2) There is no relief given American citizens for torts of the Government or its officials, and that Section 9 (a) of the Act did not intend to change this rule.

That very argument was made by the Attorney General in *Henkels* v. *Sutherland*, 271 U. S. 298, but was not followed by this Court which gave relief to the claimant.

(3) That if the seizure was unconstitutional, still the United States Government cannot be sued without its consent, and that no express consent is given by Section 9 (a), where the American's money or property has been spent.

The case of *Woodson* v. *Deutsche Bank*, 292 U. S. 449, held that the consent of the Government to be sued by an enemy alien had been withdrawn, the inference being plain that the consent still existed when the suit was brought by an American citizen, for in the absence of express enactment a consent to be sued once given is presumed to continue (*Lynch* v. *United States*, 292 U. S. 571). Moreover, in all the cases where recovery has been had, the same argument could have been made by the Government; and the fact that it was not made, or if made was not successful, is most significant. (See also *Jacobs* v. *United States*, 290 U. S. 13.)

(4) That the act referred only to property physically held at the time of bringing suit and did not apply when the Government had spent the money and did not have it on hand even though the property *should have* been held.

This point is not new, but was expressly raised in the Government brief in *Vowinckel* case (*Vowinckel* v. *Sutherland*, 24 Fed. 2d 196), and was ignored in the opinion, which decided the case on the broad principles of justice.

The construction of Section 9 (a) of the Act, made by the courts below, is not the liberal one required by the authorities already referred to. The Act never has been harshly construed as against an American, and there is nothing in the statute or its amendments which would justify any different position now from that taken at any time since the Act was first enforced.

POINT IV.

The statute gives relief, notwithstanding former officials of the government violated the rights of the American citizen.

It may be argued, as it was in the courts below, that the present acting Alien Property Custodian, Mr. Cummings, and the present Treasurer, Mr. Julian, had nothing whatever to do with the alleged wrongful acts in selling and disposing of petitioner's property, and that, therefore, they cannot be sued under the proper interpretation of Section 9 (a) of the Trading With the Enemy Act.

Section 780 of the Judicial Code of the United States (28 U. S. C. A. Sec. 780) was held by this Court in *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, to permit a cause of action against one official to be continued against the new official after the resignation or death of the first one.

It presupposes a continuity of liability for questioned action by governmental officials. In actions under the Trading With the Enemy Act, if the opposite rule were the case and the accident of death or resignation of one government official who had improperly dealt with the property of an American citizen would prevent all redress in a suit against the new official, a great injustice would result.

POINT V.

If relief is granted, petitioner is entitled to interest as well as to the return of its principal.

It was held in *Henkels* v. *Sutherland*, 271 U. S. 298, that an American claimant who recovered his property

under the Trading With the Enemy Act was entitled to have the value of his property as of the date of the taking; and that this was not strictly the recovery of interest under the rule forbidding interest to be awarded against the sovereign, but merely represented a measure of the amount to be added when the compensation was not made at once.

See also,

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106;
Phelps v. *United States*, 274 U. S. 341;
Jacobs v. *United States*, 290 U. S. 13.

If all interest were denied, the rights of the petitioner under the Fifth Amendment would be violated.

The decree dismissing this case for want of jurisdiction should be reversed; and there being no question of fact in the case, a decree should be made ordering the Alien Property Custodian and/or Treasurer of the United States to pay to the petitioner $3,887.84, with interest from February 20, 1919, the day of sale of petitioner's stock; or in any event, a new trial should be had.

Respectfully submitted,

TOWNSEND & KINDLEBERGER,
Solicitors for Petitioner.

E. CROSBY KINDLEBERGER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 820

BECKER STEEL COMPANY OF AMERICA, PETITIONER

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE United States, in his Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 20–23) is not reported officially. The *per curiam* opinion of the Circuit Court of Appeals, adopting the opinion of the District Court (R. 30), has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1935 (R. 31). The petition

for a writ of certiorari was filed March 27, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a United States district court has jurisdiction in an action against the Alien Property Custodian and the Treasurer of the United States for the recovery of a sum of money not in the possession of either of them.

STATUTE INVOLVED

The applicable portion of the statute involved is set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

The facts set forth in the complaint of the petitioner may be summarized as follows (R. 3–17):

The petitioner, an American national (R. 3), was the owner of 5,000 shares of its own stock, which shares of stock on or about July 12, 1918, were seized by A. Mitchell Palmer, the then Alien Property Custodian, as being in fact the property of an enemy alien (R. 5–6).

The petitioner recovered 2,500 shares of this stock in a suit in the United States District Court for the Southern District of West Virginia (R. 6). The remaining 2,500 shares of stock were sold by the Alien Property Custodian on or about February 20, 1919, for the sum of $20,000 (R. 6). Out

of this sum the Alien Property Custodian paid $3,887.84 for expenses incident to the sale of the stock (R. 7). The petitioner thereafter instituted suit against the Alien Property Custodian for the recovery of the sum of $20,000, and on or about August 21, 1925, a decree was entered in favor of the petitioner (R. 8–9).

The Alien Property Custodian offered to deliver to the petitioner the sum of $16,112.16 which he had in his possession, on condition that the petitioner would sign a warrant of satisfaction in full of the decree of the District Court (R. 11). The petitioner signed such a release (R. 11–12). Thereafter, in the year 1927, the then Alien Property Custodian voluntarily paid to the petitioner interest which had been earned on the sum of $16,112.16 during the time it had been in his possession (R. 12).

The petitioner on or about July 24, 1934, instituted a suit in the District Court for the Southern District of New York, asking judgment against the respondents in the sum of $3,887.84 with interest thereon (R. 1, 17). The respondents on August 9, 1934, filed a motion to dismiss the complaint for lack of jurisdiction (R. 17–18), which motion was granted on September 28, 1934 (R. 19). On appeal the United States Circuit Court of Appeals for the Second Circuit by a *per curiam* opinion affirmed the order of the District Court (R. 31).

ARGUMENT

The sole question raised in the instant case is that of the jurisdiction of a district court of the United States to entertain a suit against the Alien Property Custodian and the Treasurer of the United States for the recovery of a sum of money which was not in their possession at the time the suit was instituted. Both the District Court and the court below properly, we submit, held that no such jurisdiction existed.

It is conceded that the instant case being a suit against the Alien Property Custodian is in effect a suit against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591; *Von Bruning* v. *Sutherland*, 29 F. (2d) 631 (App. D. C.) (Petitioner's Brief, p. 29). The law is well settled that the United States cannot be sued without its consent. *Turner* v. *United States*, 248 U. S. 354, 359; *Lynch* v. *United States*, 292 U. S. 571, 582. The law is equally well settled that the United States can be sued only in such courts and on such conditions as it may see fit to permit. *United States* v. *Babcock*, 250 U. S. 328, 331; *Schillinger* v. *United States*, 155 U. S. 163, 166.

The only statutory authority for a suit by a citizen of the United States or a non-enemy alien to recover property or money improperly seized by the Alien Property Custodian is conferred by Section 9 (a) of the Trading with the Enemy Act, *infra*, pp. 9–10. This section provides that where

money or other property of such an individual has been seized by the Alien Property Custodian and "held by him or by the Treasurer of the United States", such person upon proper application may recover by an appropriate order the money "so held", or if such an order be not issued, the person aggrieved may institute a suit in the appropriate district court of the United States, and if the claim be established, the court shall order the payment or delivery of the money or other property "so held by the Alien Property Custodian or by the Treasurer of the United States,"

The statute reiterates, with reference to the Alien Property Custodian and the Treasurer of the United States, the words "hold" and "held." It follows that this section authorized those whose property had been improperly seized by the Alien Property Custodian to recover only the property or money "held by the Alien Property Custodian or by the Treasurer of the United States." *Kutroff* v. *Sutherland*, 66 F. (2d) 500 (C. C. A. 2d). Nor is there any language contained therein authorizing the recovery of any damages which might have been occasioned by the seizure of the property or its detention, notwithstanding the fact that such propery was mistakenly taken from an innocent party. It has been held that a suit would not lie against the Alien Property Custodian for damage to real property occupied by the Alien Property Custodian. *Von Bruning* v. *Sutherland, supra.*

It is admitted in the instant case that at the time of the institution of this suit neither the Alien Property Custodian nor the Treasurer of the United States had in his possession the money for the recovery of which the petitioner instituted this suit. That money had been paid out as expenses incident to the sale of the property of the petitioner long before the institution either of this suit or the one in which the petitioner succeeded in recovering the money which actually was in the hands of the Alien Property Custodian. Expenses of this nature have never been held to be a recoverable item in a suit to recover from the Alien Property Custodian property or funds improperly seized.[1] *Henkels* v. *Sutherland,* 271 U. S. 298; *Escher* v. *Woods,* 281 U. S. 379; *Kuttroff* v. *Sutherland,* 56 F. (2d) 862, 863 (S. D. N. Y.).

It is to be observed that in paragraph 19 of the complaint (R. 11–12), the petitioner admits that

[1] In fact it would appear that Section 7 (c) of the Act, as amended, precludes the recovery of expenses incident to the sale of property seized. This section provides in part (c. 201, 40 Stat. 1020, 1021, U. S. C. A., Title 50, App. Sec. 7 (c)): "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

it signed a warrant in full satisfaction of the decree of August 21, 1925, directing that there be paid to it the sum of $20,000. The petitioner does not allege that this release is invalid, nor did it ask to have the same set aside. It would seem that this recital in the complaint alone would be sufficient to justify the dismissal thereof. While the District Court did not pass directly upon this question, it intimated that the existence of the release might possibly of itself constitute a defense to this action.

The petitioner alleges that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Vowinckel* v. *Sutherland*, 24 F. (2d) 196. We perceive no conflict. In the case at bar the expenses were incident to the sale of the property, and were not held by the Alien Property Custodian at the time suit was instituted. In the *Vowinckel* case, the expenses deducted were those incurred in the defense of the suit, and obviously must have been held by the Alien Property Custodian at the time the suit was brought. In fact, the court's decision in that case was based upon the assumption that the sum there involved was still in the custody of the Alien Property Custodian.

We submit that the decision of the court below, in holding that the District Court had no jurisdiction of a claim of this character, is correct. There exists no conflict, and the question raised by the petitioner is no longer of sufficient importance to warrant review by this Court.

CONCLUSION

The case was correctly decided in the Circuit Court of Appeals, and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

STANLEY REED,
Solicitor General.

GEORGE C. SWEENEY,
Assistant Attorney General.

PAUL A. SWEENEY,
Attorney.

APRIL 1935.

APPENDIX

Section 9 (a) of the Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411, 419, as amended by the Act of June 5, 1920, c. 241, 41 Stat. 977–978 and the Act of March 4, 1923, c. 285, 42 Stat. 1511 (U. S. C. A., Title 50, App. Sec. 9), provides as follows:

> SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person

from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 13

In the Supreme Court of the United States

October Term, 1936

Becker Steel Company of America, petitioner

v.

Homer S. Cummings, Attorney General of the United States, in the Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

Brief for the Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 13

BECKER STEEL COMPANY OF AMERICA, PETITIONER

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE United States, in his Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 13–15) is reported in 10 F. Supp. 343. The *per curiam* opinion of the Circuit Court of Appeals (R. 18), adopting the opinion of the District Court, is reported in 75 F. (2d) 1005.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1935 (R. 19). The petition

for a writ of certiorari was filed March 27, 1935 (R. 20), and was granted April 29, 1935 (R. 19). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Alien Property Custodian, acting under the Trading with the Enemy Act, seized certain shares of stock owned by the petitioner and, no claim to these shares having then been filed by the petitioner, sold the shares and paid the expenses of the sale from the proceeds. Petitioner having subsequently proved its non-enemy character, the net proceeds of the sale were paid over to it. Does the District Court have jurisdiction, under the Trading with the Enemy Act or otherwise, to entertain this suit by the petitioner to recover the amount of the expenses so deducted from the proceeds of the sale?

STATUTE INVOLVED

The applicable portions of the Trading with the Enemy Act are set forth in the Appendix, *infra*, pp. 35–37.

STATEMENT

This suit was instituted in the District Court for the Southern District of New York by the Becker Steel Company of America, a corporation organized under the laws of West Virginia, to recover a sum of money deducted by the Alien Property Custodian from the proceeds of the sale of stock owned

by the petitioner and seized under the Trading with the Enemy Act. The amount deducted was used to defray the expenses incurred in the sale of the stock. The suit was brought under Section 9 (a) of the Act. The defendants are Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States. The defendants moved to dismiss for want of jurisdiction (R. 12), and their motion was granted (R. 13). On appeal to the Circuit Court of Appeals for the Second Circuit, the decree was affirmed (R. 19). This Court granted certiorari (R. 19).

The material facts shown by the complaint (R. 2–12) may be summarized substantially as follows:

(1) Pursuant to the provisions of the Trading with the Enemy Act, A. Mitchell Palmer, the then Alien Property Custodian, in July, 1918, required the petitioner to transfer to him 5,000 shares of stock in the petitioner corporation on the ground that they were owned by enemy aliens (R. 3–4).

(2) Notwithstanding the fact that 5,000 shares of petitioner's stock had been thus transferred to the Custodian, petitioner instituted suit (in the United States District Court for the Southern District of West Virginia) for the recovery of only 2,500 shares of that stock. Thereafter, pursuant to decree of the Court in that suit, 2,500 shares of stock were duly returned to the petitioner (R. 4).

(3) More than seven months after the seizure the Custodian sold the other 2,500 shares of stock to which no claim had been filed by petitioner, for the sum of $20,000.00, which was turned over to the Treasurer of the United States (R. 4).

(4) From that amount the Custodian and the Treasurer paid out sums totalling $3,887.84 to defray the expenses directly incurred in conducting the sale of the stock (R. 4, 5). There is no allegation that the expenses *per se* were in any way unreasonable or improperly incurred.

(5) More than three and a half years later, in October 1922, the petitioner for the first time filed with the then Alien Property Custodian, under Section 9 (a) of the Trading with the Enemy Act, a claim for the return of the $20,000.00 received from the sale of the stock (R. 5).

(6) Thereafter the petitioner brought suit in the District Court for the Southern District of New York, under Section 9 (a) of the Act, for the recovery of the $20,000.00 thus claimed (R. 5–6), and a judgment was entered therein in favor of the petitioner for the sum of $20,000.00 (R. 6).

(7) On applying for payment of this judgment, the petitioner was informed by the Custodian that the net proceeds of the sale of the 2,500 shares of stock amounted to only $16,112.16, as sums aggregating $3,887.84 had been expended in connection with the sale (R. 7). The Custodian, therefore, would not deliver the sum of $16,112.16 to the peti-

tioner until petitioner had signed a warrant of satisfaction of the judgment in full.[1] Such a warrant was accordingly executed by the petitioner on October 10, 1925, and it received the sum of $16,112.16 (R. 8).

(8) Thereafter, in the year 1927, the Custodian, upon a decision of this Court that interest must be paid on money belonging to American citizens and held by the Custodian under the Trading with the Enemy Act, voluntarily paid the petitioner interest upon the principal sum of $16,112.16 (R. 8).

(9) Although petitioner had previously executed a warrant of satisfaction of the judgment in full and had accepted $16,112.16 in payment thereof, and had later accepted payment of interest upon such sum, petitioner nevertheless brought suit in the year 1932 in the District Court for the Southern District of New York to recover the sum of $3,887.84, alleging that such sum had been paid out unlawfully from the principal of the fund received from the sale of petitioner's stock (R. 9). This suit was dismissed for misjoinder of parties (R. 10).

The present suit was instituted in July 1934, against the present defendants for the recovery of $3,887.84 with interest (R. 1–12). Defendants' motion to dismiss on the ground that the Court had no jurisdiction of them or of the subject matter of the

[1] This was in conformity with Section 7 (c) of the Act. For a discussion of the effect of that section, see pp. 14–16, *infra*.

action was granted (R. 13). The District Court held that an allegation that the Custodian or the Treasurer actually holds the money sought to be recovered at the time suit is instituted is a jurisdictional requisite of a suit brought, as this one was, under Section 9 (a) of the Trading with the Enemy Act. The petition contained no such allegation but instead expressly alleged that the money in question had been paid out long before (R. 4, 5). In the opinion, the District Court said (R. 15):

> It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and, as decided in *Henkels* v. *Sutherland*, 271 U. S. 298 (1925), any income therefrom actually received by the Government.

The Circuit Court of Appeals affirmed upon the opinion of the District Court (R. 18).

SUMMARY OF ARGUMENT

I

This suit was instituted under Section 9 (a) of the Trading with the Enemy Act, which confers on the District Courts of the United States jurisdiction to entertain suits brought by citizens and non-

enemy aliens for the recovery of their property seized by the Alien Property Custodian as enemy-owned. The Trading with the Enemy Act provides that before seized property has been disposed of by the Alien Property Custodian a claimant may recover the property in full (Section 9 (a)), but that after such disposition the claimant may recover only the *net* proceeds (Section 7 (c)). This Court in *Henkels* v. *Sutherland*, 271 U. S. 298, 300, stated the relation of Sections 9 (a) and 7 (c) as follows:

> Section 9 (a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right, or title in the property seized. If, in the meantime the seized property has been sold, the same remedy, by §7 (c), as amended, c. 201, 40 Stat. 1020, became available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

Section 9 (a) of the Act contemplates in the first instance a proceeding *in rem* for the recovery in specie of seized property still actually held by the Custodian or by the Treasurer at the time action is begun. Obviously the petitioner in this case cannot recover in such an action *in rem* because the bill of complaint shows on its face that at the time suit was instituted neither of the defendants held any of the property originally seized.

Insofar as Section 9 (a) authorizes, in addition to such a proceeding *in rem*, a suit for the recovery of the proceeds of property seized and subsequently disposed of by the Alien Property Custodian, it must be read in connection with Section 7 (c). Section 7 (c) expressly provides that when the Custodian, pursuant to the power of sale granted to him by Section 12, has sold seized property before claim to such property has been asserted, the citizen or non-enemy alien whose property was seized may recover only the *net* proceeds of the sale. Net proceeds in its proper and usual signification refers to that sum which is left after deducting, *inter alia*, the ordinary expenses of sale. *St. John* v. *Erie Ry. Co.*, 22 Wall. 136.

The limitation of recovery to net proceeds thus established by Section 7 (c) accords with the express language of Section 9 (a) which limits recovery in all instances to property *held* by the Custodian or by the Treasurer. After the original property has been sold and the expenses of sale paid, what is thereafter *held* by the Custodian or the Treasurer obviously is no more than the *net* proceeds. In this case the petitioner is precluded by Section 7 (c) from recovery because it has already received from the Custodian the net proceeds of the sale of its property, together with interest thereon.

Sections 9 (a) and 7 (c) must furthermore be construed in the light of Section 12 of the Act which

constitutes the Custodian a trustee of property, other than money, seized under the Act, and authorizes him to sell such property. Property seized is rightfully taken, even though it should subsequently develop that it was in fact the property of a citizen or a non-enemy alien (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stochr* v. *Wallace*, 255 U. S. 239), and the powers of the Custodian in holding and selling such property are those of a trustee. The sale of the petitioner's property was lawful because before the sale no claim to the property had been filed by the petitioner so as to require the property thereafter (under Section 9 (a)) to be held intact. A trustee is entitled to defray expenses properly incurred in the administration of the trust estate out of the trust property even in the absence of express authorization. *United States* v. *Swope*, 16 F. (2d) 215, 217 (C. C. A. 8th). The petitioner alleges that the sale of its stock by the custodian was illegal, but it does not allege that the expenses incurred in the sale were *per se* in any way unreasonable or improperly incurred. Therefore, the petitioner is not entitled to recover the sums properly expended by the Custodian in the sale of the stock of the petitioner. Cf. *Kelly* v. *Nichols*, 18 R. I. 62; *Collumb* v. *Read*, 24 N. Y. 505, 515; *Beck* v. *Kinealy*, 89 Mo. App. 418, 424.

Because this suit is against the United States, it can be brought only as authorized by specific statutory provision. It cannot be brought under

the Tucker Act[2] upon any theory of implied contract because the Trading with the Enemy Act, a later statute, expressly declares in Section 7 (c) that the remedies provided by that Act shall be exclusive for all claims arising out of seizures under the Act. Accordingly this suit can only be brought in conformity with the provisions of Sections 9 (a) and 7 (c) of the Trading with the Enemy Act. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591; *Von Bruning* v. *Sutherland*, 29 F. (2d) 631 (App. D. C.).

II

The petitioner had ample opportunity to recover the stock by filing a claim under Section 9 (a). The bill of complaint shows that at the time the stock in question was seized, other similar stock belonging to the petitioner was also seized, and that the latter stock was in due course claimed and recovered *in specie* by the petitioner. Yet with respect to the stock involved in this suit, the petitioner chose to wait for four years after the seizure to file a claim, and it must therefore be content with the remedies provided by the statute for those who fail to bring a timely proceeding for specific recovery and delay

[2] The Tucker Act, c. 359, 24 Stat. 505, as amended (28 U. S. C. A., Sec. 41 (20)), vests in the District Courts of the United States original jurisdiction over suits brought on contracts, express or implied, with the Government of the United States. Suits instituted under the Act must be brought within six years after the accrual of the right for which claim is made.

until after the Custodian has exercised his lawful power of sale. This Court has held that the remedies afforded by the Act provide full and adequate protection for the citizen or non-enemy alien whose property has been mistakenly seized under the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. The petitioner, having failed to avail itself of its opportunity to recover the stock *in specie*, and having successfully exercised its right to recover the net proceeds under Section 9 (a) as qualified by Section 7 (c), cannot now contend that it has been deprived of its property unconscionably or without due process of law.

III

While this Court has not previously been called upon to pass upon the exact question presented by this case, its decisions fully support the construction placed upon Sections 9 (a) and 7 (c) of the Trading with the Enemy Act by the respondents herein and by both courts below. In *Henkels* v. *Sutherland*, 271 U. S. 298, 302, it was explicitly recognized that after the sale of property seized under the Act, the claimant was entitled, under Section 7 (c), only to that portion of the proceeds of the sale which remained after "proper charges and expenses" had been deducted. In *Escher* v. *Woods*, 281 U. S. 379, this Court merely disallowed the deduction by the Custodian of an arbitrary percentage

of the value of the assets for general administration expenses without reference to the expenses actually incurred in connection with the particular property. The District Court in that case did allow deduction of those items of expense which were directly attributable to the administration of the property claimed and the claimant did not appeal from that decision. No case has been cited by the petitioner in which any court has declined to permit the deduction of such direct expenses.

ARGUMENT

I

THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN A SUIT FOR THE RECOVERY OF MONEY NECESSARILY EXPENDED FROM THE PROCEEDS OF THE SALE OF PROPERTY SEIZED UNDER THE TRADING WITH THE ENEMY ACT.

A. THE TRADING WITH THE ENEMY ACT PROVIDES THAT BEFORE SEIZED PROPERTY HAS BEEN DISPOSED OF BY THE ALIEN PROPERTY CUSTODIAN A CLAIMANT MAY RECOVER THE PROPERTY IN FULL, BUT AFTER SUCH DISPOSITION THE CLAIMANT MAY RECOVER ONLY THE NET PROCEEDS.

In enacting the Trading with the Enemy Act (October 6, 1917, 40 Stat. 411, as amended; appendix to 50 U. S. C. A.), Congress recognized the fact that the administration of an Act providing for the summary seizure of the property of enemy aliens would inevitably be attended by mistakes,

and that instances would occur in which property so taken would ultimately prove to be owned by citizens or by non-enemy aliens. Accordingly, provisions for the relief of such persons were necessarily and properly incorporated in the Act.

Section 9 (a),[3] under which this suit was instituted, provides for the return of the property of a citizen from whom it has been taken under the misfaken belief that it was that of an enemy alien. Immediately upon the seizure of his property a citizen may file with the Custodian a notice of his claim. The claimant may accompany his notice with an application to the President for the return of the property. If this course is not productive of relief, the claimant may thereafter institute a suit in equity to determine the validity of his claim. In the alternative, he may, instead of applying to the President, institute his suit immediately upon filing his notice of claim with the Custodian. In either case the court is authorized to order the return of the property if the claimant is successful. Section 9 (a) further provides that upon the institution of the suit the property held by the Custodian or by the Treasurer shall be retained until a judgment in favor of the claimant shall be satisfied by the return of the property, or until a final judgment adverse to the claimant shall be entered. Section 9 (a) thus authorizes a suit *in rem* "to establish the interest, right, [or] title" to

[3] Section 9 (a) of the Trading with the Enemy Act appears in the Appendix at p. 35, *infra*.

specific property or money. The District Courts are authorized to order the return of the property "so held" by the Alien Property Custodian, or by the Treasurer.

Insofar as Section 9 (a) authorizes a suit for the proceeds of property seized and afterwards sold by the Custodian, recovery is again limited to the property "held" by the Custodian—viz., the net proceeds of the sale. This limitation appears not only from the use of the limiting expression "held by", but also from reading Section 9 (a) in conjunction with Section 7 (c) of the Act, which provides:

> *The sole relief and remedy* of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him *shall be that provided by the terms of this Act,* and in the event of sale or other disposition of such property by the Alien Property Custodian, *shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.* (Appendix 50 U. S. C. A., sec. 7 (c).) (Italics supplied.)

The clear import of this section is that where the claimant has delayed the filing of his claim until after his property has been sold and costs of sale have been incurred by the Government, those

expenses are to be satisfied out of the proceeds of the sale, and the balance returned to the claimant upon the establishment of his right.

The instant case falls squarely within the scope of Section 9 (a) as limited by Section 7 (c). The stock involved in this suit was seized by the Custodian, and held by him for more than seven months. During that time no claim to this stock was filed. The Custodian then sold the stock. Upon subsequently filing his claim therefor, the petitioner became entitled only to the net proceeds of the sale of the stock. Having already received the net proceeds of the sale of the stock (R. 8), the petitioner is precluded by the terms of Section 7 (c) from recovering any further amount.

The petitioner suggests that the sums paid out to defray the expenses of the sale form a part of the "net proceeds" of that sale (Brief, pp. 27–28). This position is clearly untenable. The sale price represents the "gross" and not the "net" proceeds. "Net proceeds" refers to that sum which is left after deducting, *inter alia*, the usual expenses of sale. This Court has so indicated in *St. John* v. *Erie Ry. Co.*, 22 Wall. 136, 148, where it was said:

> The lexical definition of *net* is "clear of all charges and deductions."—Webster. "That which remains after the deduction of all charges or outlay, as net profit."—Worcester. The popular acceptation of the term is the same.

See also *Evans* v. *Waln,* 71 Pa. 69, 74; *Dallas County* v. *Land and Cattle Co.,* 95 Tex. 200, 207; Cf. *McMurphy* v. *Garland,* 47 N. H. 316, 319–320; *Foreman* v. *Ruth Elaine Realty Corp.,* 240 App. Div. (N. Y.) 490.

Thus it is clear that Section 7 (c) expressly limits the recovery authorized by Section 9 (a), after sale of the property seized, to the sums remaining after deduction of expenses incident to the sale. In the instant case petitioner long ago has been paid this sum and is entitled to nothing more.

That this is the meaning and intention of the Act appears further from the specific language of both Sections 9 (a) and 7 (c) which in terms limit recovery to property or money *"held by"* the Custodian or Treasurer. Neither section contains the slightest suggestion of authority for the recovery of property or money properly disposed of and so no longer *"held by"* the Custodian or the Treasurer. The word "held" as used in the text of Sections 9 (a) and 7 (c) means, as both courts below have decided, that property or money must be held by the Custodian or the Treasurer *at the time suit is instituted,* and there is no warrant for the petitioner's contention that "held" as used in those sections means "held at any time" or which "should have been held" (Brief, pp. 31–34).

The petitioner has made no allegation that the defendants at present hold any money belonging to it. As pointed out by the trial court (R. 14) such a holding is expressly negatived by the bill of com-

plaint which alleges that the sums have been "paid out" (R. 4) and which asserts merely that the defendants "must be deemed in justice and truth to have had on hand" the money claimed (R. 11). Since the Trading with the Enemy Act contemplates an actual rather than a fictitious "holding", the bill of complaint clearly fails to allege facts sufficient to give the court jurisdiction over the defendants or the subject matter of the action.

B. THE LIMITATION OF RECOVERY TO THE NET PROCEEDS FOLLOWS ALSO FROM THE PROVISION OF THE ACT CONSTITUTING THE ALIEN PROPERTY CUSTODIAN A TRUSTEE

The conclusions reached by the courts below as to the construction of the Trading with the Enemy Act follows also from the provisions of Section 12 of the Act.* That section vests in the Alien Property Custodian all the powers of a common-law trustee with respect to all property, other than money, which shall be received by him under the Act and authorizes him to sell such property as though he were the owner, under rules and regulations prescribed by the President (Appendix to 50 U. S. C. A., sec. 12).

Property mistakenly seized by the Custodian and held by him, although in fact owned by a citizen, is nevertheless rightfully held by the Custodian until the citizen establishes his right to the property by appropriate proceedings under the

*Section 12 appears in the Appendix at p. 37, *infra*.

Act. This Court said in *Stoehr* v. *Wallace*, 255 U. S. 239, 245:

> That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for return in case of mistake, is not debatable.

The power of sale vested in the Custodian applies to property which may ultimately prove to be owned by a citizen or non-enemy alien as well as to property in fact enemy-owned. Thus it was stated in *Sielcken-Schwartz* v. *American Factors* (C. C. A. 2d) 60 F. (2d) 43, 45 (certiorari denied, 287 U. S. 654):

> There is not the slightest reason to suppose that this [the power of sale under Section 12] was intended to apply only to property which was in fact enemy-held, and it would have been impossible to execute the purposes of the act if it had been. The custodian, having determined that the property was subject to the act, might never discover his mistake; the owner might not apply to any court, might apparently acquiesce in his decision. The property must meanwhile be protected; good occasions not be let slip; all sorts of action might be essential in the very interest of the owner.

See also *Miller* v. *Lautenberg*, 239 N. Y. 132, 135–136 (opinion by Mr. Justice Cardozo). The Custodian, therefore, had full and complete authority under Section 12 to sell the stock of the petitioner

should he deem it advisable so to do, since petitioner had filed no claim to it under Section 9 (a). In these circumstances, the sale of the property obviously was not wrongful or unlawful, as the petitioner has repeatedly alleged it to be, but was performed in the orderly administration of the property and petitioner alleges no facts whatever to support its contrary allegation.

A trustee is normally entitled to be credited with all sums properly paid or transferred by him from the trust funds in the administration of the trust estate, even in the absence of an express provision therefor. 4 Bogert, Trusts and Trustees, (1935) sec. 971; 2 Perry, Trusts and Trustees, (7 ed.) secs. 910, 912. In the language adopted by the court in *United States* v. *Swope*, 16 F. (2d) 215, 217 (C. C. A. 8th):

> "It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges, and expenses incurred in the execution of the trust."

As has been shown, the possession by the Custodian was authorized and valid, at least until a claim for the return of the property was filed. Yet even in the case of a void trust the trustee is entitled to compensation for his expenses incurred in good faith for the benefit of the estate. *Kelly* v. *Nichols*, 18 R. I. 62; *Collumb* v. *Read*, 24 N. Y. 505, 515; *Beck* v. *Kinealy*, 89 Mo. App. 418, 424. *A fortiori*, the Custodian is entitled to receive credit

for the expenses of this sale, incurred in the administration of the trust before the owner had filed any claim for the return of its property.

The cases cited by the petitioner (Brief, pp. 23–24) as holding the contrary are not in point. They hold merely that the litigation expenses incurred in unsuccessfully defending adversary proceedings for possession of trust property against the person rightfully entitled cannot be charged against the trust property. The deduction made by the Custodian in this case was not of that character. There is a clear distinction between expenses incident to a suit maintained for the purpose of excluding the rightful claimant of a trust estate, and those which arise in the natural course of the lawful administration and protection of the property. The latter type of expense arises not in proceedings which are in derogation of the right of the owner, but rather in the management of his property. It is to be noted that the petitioner makes no allegation that the expenses, to the deduction of which he objects, and which he seeks in this proceeding to recover, were too great or were unnecessary or improper expenses in connection with the sale of the stock.

C. ONLY THE REMEDIES AFFORDED BY THE TRADING WITH THE ENEMY ACT ARE AVAILABLE TO A CLAIMANT OF PROPERTY SEIZED THEREUNDER

A suit instituted under the Trading with the Enemy Act is a suit against the United States, and must therefore be brought in conformity with the statutory requirements laid down by Congress in

giving its consent to the suit. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591; *Von Bruning* v. *Sutherland,* 29 F. (2d) 631 (App. D. C.). Thus in the *Banco Mexicano* case this Court affirmed the dismissal of a suit brought to enforce a claim under the Trading with the Enemy Act, saying (pp. 602–603):

> We are constrained to this because we agree with the Court of Appeals that this suit is in effect a suit against the United States and all of its conditions must obtain.

The petitioner in this regard appears (Brief. pp. 13–14, 33–34) to distinguish between suits brought by an enemy alien and those brought by a citizen whose property has been seized erroneously. None of the cases cited makes this distinction, and several are clear authority that the suit authorized by the Act is one against the United States, no matter by whom it may be brought. *Henkels* v. *Sutherland,* 271 U. S. 298, 301, and *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 471–472, were suits brought by citizens or friendly aliens to recover property seized, while *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603, and *Miller* v. *Robertson,* 266 U. S. 243, 257, were suits brought by citizens or friendly aliens to establish claims against enemy property in the possession of the Custodian. Each expressly or by clear intimation recognizes that the suit is one against the United States.

In this case the provision of Section 7 (c) making the relief afforded by Section 9 (a) the sole

remedy available to the citizen whose property is mistakenly seized expressly excludes the right, if it otherwise might be thought to exist, of proceeding under the Tucker Act on a theory of an implied promise of compensation for the seizure.

It is further to be observed that long prior to the institution of this suit the jurisdictional statute of limitations applicable to the Tucker Act, providing that suits instituted under that statute must be brought within six years after the accrual of the right asserted, would have barred any suit under that Act.[1] Therefore, even if the Trading with the Enemy Act were deemed to be unconstitutional as not affording petitioner an adequate remedy, the District Court would have had no jurisdiction of an action to recover the amount here sought.

II

The Remedies Afforded by the Trading With the Enemy Act Amply Protect the Petitioner's Constitutional Rights

The bill of complaint in this case shows that 5,000 shares of stock were seized by the Custodian (R. 3–4). It shows that the petitioner in due course

[1] The Tucker Act, c. 359, 24 Stat. 505, as amended (28 U. S. C. A. sec. 41 (20)), vests in the District Courts of the United States original jurisdiction over suits brought on contracts, express or implied, with the Government of the United States. Suits instituted under the Act must be brought within six years after the accrual of the right for which claim is made.

claimed and instituted a suit for the recovery of 2,500 shares of the stock seized, and that pursuant to the decree entered in that suit those shares were returned to it. It reveals that the sale of the other 2,500 shares seized (*i. e.*, the stock the proceeds of whose sale are in question in this case) did not occur until seven months had elapsed from the date of seizure (R. 3–4). It fails to show that any action whatever was taken by the petitioner during that time to assert any right to that stock, and it does show that it was not until more than three and a half years had elapsed after the sale that any claim was filed with the Custodian (R. 4–5). The petitioner does not allege any facts indicating that it did not have full opportunity to file a claim with the Custodian and recover those shares in specie, as it had recovered the others.

The petitioner maintains that the construction placed on Section 9 (a) of the Trading with the Enemy Act by the courts below renders it violative of the due process clause of the Fifth Amendment (Brief, pp. 2, 28), and invokes the rule of statutory construction that a statute is to be construed, if possible, so as to make it constitutional. However, the rule of construction invoked is plainly not applicable in the instant case, because there is no ambiguity in Sections 9 (a) and 7 (c), and, moreover, those sections, under the construction given them by the lower court, do not deprive the petitioner of property without due process of law.

That the provisions of Section 9 (a) afford an adequate remedy for the relief of the citizen whose property has been mistakenly seized under the Act has been determined by this Court. In *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, the Court affirmed decrees authorizing the Alien Property Custodian to take possession of property under the Act without a precedent determination of the right of the Custodian to such property, saying (at pp. 567–568):

> Upon surrender the claimant may at once file a claim under Section 9, * * * and * * * may bring a suit to establish his rights in the District Court, in which case the property is to be retained by the Custodian until final decree.

In *Stoehr* v. *Wallace*, 255 U. S. 239, the Court, in affirming a decree rejecting a claim made under Section 9 (a), sustained that section, and after reciting the remedies therein provided for the relief of the citizen whose property had been seized, stated (pp. 245–246):

> Thus there is provision for the return of property mistakenly sequestered; *and we have no hesitation in pronouncing it adequate*, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious. (Italics supplied.)

Later in *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, the Court commented upon its decisions in *Cen-*

tral Union Trust Company and *Stoehr* cases, saying (pp. 56–57):

> In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as we have said, for mistakes in its exercise by the claimant of the property filing a claim under § 9, which, if not yielded to, may be enforced by suit.

Section 9 (a) expressly confers the right to recover property prior to sale, and, as limited by Section 7 (c), the right to recover the net proceeds after sale. The failure of petitioner to proceed prior to sale does not render the statute unconstitutional in view of the provisions contained in Sections 9 (a) and 7 (c) for recovery both before and after sale.

In any event, jurisdiction to entertain this suit, which purports to be brought under Section 9 (a), cannot be based on the ground that Section 9 (a) does not afford a constitutionally adequate remedy even if the latter conclusion should be reached. In that case petitioner would have to resort to some other form of remedy.

III

The Previous Decisions of This Court Are Consistent with and Support the Construction of the Act Limiting Recovery After Sale to the Net Proceeds Thereof

This Court has given sanction to the construction placed on Sections 9 (a) and 7 (c) of the Trading

with the Enemy Act by the respondents and by both courts below. In *Henkels* v. *Sutherland*, 271 U. S. 298, the claimant, a citizen of the United States, brought suit under Section 9 (a) of the Trading with the Enemy Act to recover the proceeds of the sale of stock which had been seized by the Alien Property Custodian. A decree rendered in his favor included interest earned on the proceeds. Upon the refusal of the Treasury to pay to him the income earned on the proceeds, which had been invested in government securities, he applied to the District Court to name a master to take and state the account of interest so earned. A denial of his application was affirmed by the Circuit Court of Appeals. On appeal this Court held that the claimant was entitled to the income earned by the proceeds of the sale which were actually held by the Treasurer, but affirmed the right of the United States to deduct the "proper charges and expenses" incurred in making the sale. The Court recognized the interrelation of Sections 9 (a) and 7 (c) by stating (at p. 300):

> Section 9 (a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right, or title in the property seized. *If, in the meantime, the seized property has been sold, the same remedy, by § 7 (c), as amended, c. 201, 40 Stat. 1020, becomes available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the*

> *Treasurer of the United States.*" (Italics supplied.)

A similar conclusion as to the effect of the two provisions is found in *Miller* v. *Lautenberg*, 239 N. Y. 132, 135–136. The Court in the *Henkels* case concluded (p. 302) that:

> Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, *after deducting proper charges and expenses* and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. (Italics supplied.)

Although it is true as suggested by the petitioner (Brief, p. 15), that in the *Henkels* case the claimant made no claim to that portion of the proceeds which was consumed by the expenses of the sale and the cost of administering the property, it seems clear from the opinion that the Court approved the deduction of those items.

Much reliance is placed by the petitioner (Brief, pp. 17–19) upon the decision of this Court in *Escher* v. *Woods*, 281 U. S. 379. In that case the claimant, a non-enemy alien, brought suit to recover specific property mistakenly seized as enemy-owned under

the Trading with the Enemy Act. After recovery by the claimant, the Alien Property Custodian sought to deduct for administrative expenses an amount equal to two percent of the corpus which was then in the custody of the Treasurer. No attempt was made by the Custodian to show the amount of the expenses actually incurred in administering the property of the claimant. The disallowance of the deduction by the District Court was reversed by the Circuit Court of Appeals, and a writ of certiorari was granted by this Court. This Court reversed the decree of the Circuit Court of Appeals, declining to allow the deduction. This Court said (at p. 384):

> We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary *the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner.* (Italics supplied.)

It is clear from the language just quoted that what this Court held improper was the practice of levying a blanket charge on all the seized property in the possession of the Alien Property Custodian, irrespective of the actual cost of the administration of particular assets, and the inclusion in such blanket charge of the general office expenses and salaries in connection with the office of the Alien

Property Custodian. This Court in effect held that the Alien Property Custodian could not treat all the properties administered by him as one great trust, allocating his total expenses equally to all assets held and administered by him, irrespective of the expenses incurred in connection with particular assets. This Court did not hold that it was improper to deduct expenses directly attributable to particular assets from the *corpus* thereof.

In the *Escher* case the Custodian sought to justify the deduction of an amount for current general office administration expenses, among other ways, on the basis of an Act (Act of May 16, 1928, c. 580, 45 Stat. 573, 574), which provided that "all expenses of the office . . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." Referring to this Act, the Court pointed out that insofar as it authorized deductions for general office expenses, it provided that these deductions were to be made from current income and not from the *corpus,* saying (p. 384):

> It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

Thus this Court did not hold that *no* deductions may be made from the *corpus,* but, speaking with sole reference to the deductions expressly authorized by the Act of May 16, 1928, held that the Custodian had no authority to make such deductions from the *corpus.*

There are thus two outstanding differences between the *Escher* case and the case at bar:

1. The *Escher* case involved the deduction of a blanket charge for general administrative expenses, rather than a deduction of expenses actually incurred in connection with the administration of the claimant's property.

2. The *Escher* case involved an attempted deduction from the *corpus* of current administration expenses which the amendment of 1928 expressly provided should be deducted only from income; whereas, the deduction in the case at bar, which is authorized by Section 7 (c) of the Act, is not for current expenses but for the expenses of a transaction which directly relates to the *corpus,* namely, the sale of the stock.

No question of the deduction of actual expenses, as contemplated by Section 7 (c), was involved in the *Escher* case. Since the pronouncement of the Court in the *Escher* case relates solely to deductions authorized by the Act of 1928, and since no question of the deduction of actual expenses as contemplated by Section 7 (c) was involved, the statement of the Court provides no authority for

disallowance of the deduction from the *corpus* of the actual expenses of sale, made by the Custodian in the instant case.

An examination of the record before this Court in the *Escher* case shows that the order of the District Court allowed certain deductions for the *actual expenses chargeable to the specific property claimed,* and the claimant took no appeal from that order (R., *Escher* case, 83, 84).

The case of *Vowinckel* v. *Sutherland,* 24 F. (2d) 196 (C. C. A. 9th), cited by the petitioner, is to be distinguished, first, upon the ground that in that case the expenses which were disallowed were litigation expenses incurred by the Government in unsuccessfully resisting the claim of the person held by the court to be entitled, and, second, upon the ground that no showing was made that the Custodian was not in actual possession of the full amount of the money claimed at the time suit was instituted. The court decided that the Act could not reasonably be construed to authorize the deductions made by the Custodian, saying (at p. 198):

> Expenses incurred in resisting the former appeal were not incurred by the Custodian, or by any depositary for him, in securing the possession, collection or control of the money or property, and it seems equally manifest that they were not incurred in protecting or administering the same.

The *Vowinckel* case is similar in principle to the cases previously distinguished, *supra*, p. 19. Like those cases, it involves only the deduction of expenses incurred in resisting the claim of a party lawfully entitled to an interest in the property in dispute.

That no showing was made in the *Vowinckel* case that the sum sought to be recovered was not then in the possession of the Custodian is clear from the following discussion (at p. 198):

> But the appellee contends that the deductions have already been made, rightfully or wrongfully, and that, the funds having passed beyond the control of the Custodian, the courts are powerless to grant relief. *But this question does not arise on the present record.* The statute makes it the duty of the Custodian to retain the money and property to abide the judgment of the court, except as to the limited expenditures authorized by section 24, and until some showing is made to the contrary the courts must presume that he has discharged that duty. The contrary does not appear from the affidavit filed by the appellant, and this constitutes the complete record on this appeal. *What the result will be, should it later appear on the final hearing that the Custodian is powerless to further comply with the decree of the court, we need not now determine.* (Italics supplied.)

It is apparent, therefore, that in the *Vowinckel* case there was nothing in the record to show that the property claimed was not actually held by the Custodian. The court, in deciding that case, did not intimate that it had any power to enter a decree ordering the return of funds not held by the Custodian or the Treasurer.

CONCLUSION

It is clear from Sections 9 (a) and 7 (c) that the Trading with the Enemy Act limits recovery by citizens or nonenemy aliens to recovery of property or money held by the Custodian or Treasurer at the time suit is instituted; and that, in the event of sale of any of the property seized, recovery is limited to and can be enforced only against the net proceeds of sale. It is also clear that the words "net proceeds" contemplate the deduction of the actual expenses of sale of particular assets of the claimant. Jurisdiction to grant relief after sale is expressly limited to the net proceeds of sale which are held by the Custodian or the Treasurer. It follows that the District Court in the instant case had no jurisdiction to entertain this suit; that the court properly granted the motion to dismiss; and that the affirmance by the Circuit Court of Appeals was proper.

It is respectfully submitted that the petitioner has already received the full measure of relief to

which it is entitled under the Act, and that the order of the Circuit Court of Appeals should be affirmed.

STANLEY REED,
Solicitor General.
ANGUS D. MACLEAN,
JOHN DICKINSON,
Assistants Attorney General.

WENDELL BERGE,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
EDWARD FIRST,
Attorneys.
JOHN C. HERBERG,
Special Attorney.

OCTOBER 1935.

APPENDIX

The Trading with the Enemy Act of October 6, 1917, as amended (50 U. S. C. A. Appendix) provides, *inter alia:*

SEC. 7 (c).

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the

United States may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is en-

titled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 12.

* * * * * *

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or thing in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *

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dissent op. 1+2.

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1935.

Becker Steel Company of America, Petitioner, *vs.* Homer S. Cummings, Attorney General of the United States, etc., et. al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 11, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit against the Attorney General as Alien Property Custodian, and the Treasurer of the United States, brought in the District Court for Southern New York under § 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended 42 Stat. 927,[1] to recover a balance of the proceeds of sale of certain shares of stock seized and sold by the Alien Property Custodian. An earlier suit brought for the same purpose was dismissed on the ground that the attempted reviver against the then Alien Property Custodian and Treasurer was too late. 66 F. (2d) 497; cf. *Fix v. Philadelphia Barge Co.*, 290 U. S. 530.

[1] Relevant portions of the Trading with the Enemy Act are:

"Sec. 7 (c) . . . The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

"Sec. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit

40 Stat. 1020, 1021,

The complaint alleges, among other things not now material, that the petitioner, owner of the shares seized, was not an enemy alien; that the Alien Property Custodian, predecessor in office of the Attorney General now acting in that capacity, sold the stock for $20,000, the balance of which, after paying expenses of the sale amounting to $3,887.84, he turned over to the petitioner. Judgment is demanded for the amount paid out as expenses.

The district court granted a motion to dismiss the bill of complaint for want of jurisdiction. 10 Fed. Sup. 343. Its order was affirmed by the Court of Appeals for the Second Circuit on the opinion of the district court. 75 F. (2d) 1005. This Court granted certiorari, — U. S. —, because of the nature and importance of the question involved and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Ninth Circuit in *Vowinckel* v. *Sutherland*, 24 F. (2d) 196.

The trial court held, as is conceded here, that the suit brought against officers of the government in their official capacities is in substance a suit against the United States authorized, if at all, by § 9 (a) of the Trading with the Enemy Act. See *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591; *Henkels* v. *Sutherland*, 271 U. S. 298. That section provides that the non-enemy claimant "may institute a suit in equity . . . in the district court . . . to establish the interest, right, title . . . so claimed," and that "if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or

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at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

other property so held by the Alien Property Custodian or by the Treasurer of the United States." These provisions the district court construed as granting the privilege of suit to a non-enemy only when the money or property demanded is "held" by the Alien Property Custodian or the Treasurer of the United States at the time of suit, and concluded that it lacked jurisdiction to entertain the suit since the money demanded had been disbursed before suit.

The Government urges that these clauses must be read with the requirement of § 9 (a) that after suit instituted the money or property claimed shall be retained in the custody of the Alien Property Custodian or of the Treasurer of the United States until final judgment and also with the provision in § 7 (c) that the remedy given by the act "in the event of sale or other disposition of such property by the Alien Property Custodian shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer."

The question thus presented is not one of jurisdiction of the district court in the strict sense of its power or authority as a federal court to decide whether the suit would lie. Cf. *Sperry Gyroscope Co.* v. *Arma Engineering Co.*, 271 U. S. 232; *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326; *Timken Co.* v. *Pennsylvania R. R. Co.*, 274 U. S. 181, 185; *Binderup* v. *Path[illegible] Exchange*, 263 U. S. 291, 305. It had power to determine whether the suit was one permitted by the statute and the only question presented now is whether its decision is erroneous.

Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra*, 301. Instead by Section 9 (a) it gave to the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time, by the all-inclusive language of § 7 (c) it denied to him any other remedy.

The seizure and detention which the statute commands and the denial of any remedy except that afforded by § 9 (a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it. See *Henkels* v. *Sutherland, supra; Central Union Trust Co.* v. *Garvan, supra,* 566, 569; *Stoehr* v. *Wallace, supra,* 246. Plainly inadequate would be a remedy which could be availed of only while the Custodian or Treasurer continued to retain possession of the seized property or its proceeds, and which would be lost whenever he disposed of the property and proceeds, whether lawfully or not. In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient. The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it, see *United States* v. *Lynah,* 188 U. S. 445, 471; *Jacobs* v. *United States,* 290 U. S. 13; *Perry* v. *United States,* 294 U. S. 330; *Brooks-Scanlon Co.* v. *United States,* 265 U. S. 106, must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States,* 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. Hence Section 9 (a) must be broadly construed to give effect to its remedial purpose, see *Miller* v. *Robertson,* 266 U. S. 243, 248; *Behnmeyer & Co.* v. *Miller,* 266 U. S. 471, 472.

In the present state of the record it is unnecessary to inquire whether the effect of the act is to sanction in every case the sale of the property of a non-enemy giving him recourse only to the proceeds of sale. See *Sielcken-Schwartz* v. *American Factors,* 60 F. (2d) 43, 44. That question was not raised or considered below. The issue now presented is much narrower, whether the failure of the Custodian to retain possession of the seized property or its proceeds precludes all inquiry as to the propriety of the disposition which he has made of them. Such, we think, is not the effect of the provisions in §§ 7 and 9, construed in the light of constitutional obligations which we must assume Congress did not intend to

ignore. Section 9-(a) is specific in permitting the non-enemy claimant to institute a suit to establish the interest, right or title claimed. "If so established" the court in terms is directed to order the satisfaction of the claim from property "held" by the Custodian or Treasurer. But these words do not deny the right to establish the claim or to enter judgment upon it when established, even though the property is no longer held by the Custodian. Directions that the money or property be retained and used for satisfying the decree in a pending suit are not the equivalent of a command that the suit be dismissed if the property is not so retained. If they were we should be forced to the conclusion, although the court below did not go so far, that the claim could be defeated by the waste or dissipation of the seized property by the Custodian at any time before judgment, after suit brought, as well as before.

Nor does the provision in § 7 that the remedy in the event of sale is to be limited to the net proceeds of sale "received therefrom and held" by the Custodian preclude inquiry whether amounts expended were lawfully charged against the gross proceeds. *Escher* v. *Woods*, 281 U. S. 379. "Net proceeds of sale" thus means no more than gross proceeds less charges which may be rightly deducted and we think that the direction that the remedy is to be limited to net proceeds "held" by the Custodian must be taken, not in the narrow and restricted sense as indicating only the proceeds retained by him at the precise moment of entering the decree, but as signifying proceeds held by him at any time and not lawfully disbursed. Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and alien friends an adequate remedy for invasions of their property rights in the exercise of the war powers of the government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies.

In *Escher* v. *Woods*, *supra*, the Custodian had paid the proceeds of sale of non-enemy property into the treasury of the United States after deducting 2% which he had paid into a fund to be used for paying the expenses of his office during the period of administration; expenses not shown to be rightly chargeable

against the proceeds of sale. In allowing recovery of the amount improperly deducted the right to recover was not thought to turn on whether the expenses had or had not been in fact paid out by the Custodian. This Court placed its decision on the broad ground that under the statute the unlawfulness of the charges made by the custodian against the proceeds of sale of non-enemy owned property is open to judicial inquiry and that the limitation of recovery to net proceeds did not permit an unauthorized outlay to be deducted from the proceeds of sale.

We intimate no opinion as to the lawfulness of the deducted expenditures. We decide only that the right to challenge them is not lost because they have been made.

We do not pass upon the validity of the defense of the Statute of Limitations and others, the possibility of which is suggested by the allegations of the bill of complaint. Even if raised by the government's motion to dismiss for want of "jurisdiction of the persons of the defendants or of the subject matter of the action" they were not considered below or urged here. Whether, in a suit brought under the Trading with the Enemy Act against the Alien Property Custodian, these defenses go to the jurisdiction, as has been held in the case of the defense of the Statute of Limitations in a suit against the United States under the Tucker Act, see *Compagnie Generale* v. *United States*, 51 F. (2d) 1051, 1056; cf. *Finn* v. *United States*, 123 U. S. 227, or whether they go only to the merits, are questions which have never been decided. They have not been argued here. We think we should not undertake to decide them in the present posture of the case. *Scott* v. *Armstrong*, 146 U. S. 499, 512, 513.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1935.

Becker Steel Company of America, Petitioner, *vs.* Homer S. Cummings, Attorney General of the United States, etc., et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 11, 1935.]

Mr. Justice Roberts.

Although I do not disagree with the opinion of the Court respecting the meaning of the word "held" as found in Section 9 (a) of the Trading with the Enemy Act, I think we should not decide the point in this case. The order of the District Judge dismissing the action for want of jurisdiction was right notwithstanding he may have been in error as to the necessity of actual possession of the property or its proceeds by the Government's representatives at the date of suit.

The action is clearly one against the United States[1] and consent to be sued evidenced by Act of Congress is essential to jurisdiction. The question is whether such consent has been given. Whatever view may be taken of the nature of the action as disclosed by petitioner's pleading the answer must be in the negative.

The Government has consented to be sued as is evidenced by Section 9 (a). It appears by petitioner's own declaration, however, that it availed itself of the privilege of suit thus granted and recovered a judgment for the full amount of the proceeds of the stock which had been seized by the Alien Property Custodian. The present action is a second suit to recover another judgment for a portion of the same money embraced in the former judgment. I fail to find any indication in the Act that Congress intended to afford a claimant two suits and two judgments for the same moneys.

Entirely apart from the provisions of the Trading with the Enemy Act, however, the District Court is without jurisdiction

[1] *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 602; *Von Bruning* v. *Sutherland*, 29 F. (2d) 631; *Henkels* v. *Sutherland*, 271 U. S. 298, 301.

to permit a second action for a sum admittedly embraced in a judgment which is of record in that court.

Suit cannot be maintained under the Tucker Act as amended.[3] The six year limitation on suits against the Government is not merely a defence to be pleaded or waived but is jurisdictional.[4] The sale of the property by the Custodian and the recovery of the first judgment for the proceeds of the sale both occurred more than six years prior to the institution of this action. Moreover, the express provision of Section 7 of the Trading with the Enemy Act, that the sole relief and remedy of any person having a claim under the Act shall be that afforded by the Act, precludes a suit for the property or the proceeds of it under the Tucker Act.[4]

The complaint asserts that the judgment recovered for the entire proceeds of the sale of plaintiff's stock has been formally released and satisfied. The satisfaction is said to have been obtained by duress. If the present proceeding be viewed as an action on the judgment the satisfaction is a bar to its maintenance; if treated as an appeal to the equity powers of the Court to set aside the release and satisfaction the Tucker Act is not a consent to the prosecution of such an action in the District Court.[5]

I think it idle to remand the case to the District Court merely because of an erroneous reason assigned in support of the order of dismissal, since the suit will again have to be dismissed for the lack of jurisdiction. I should, therefore, affirm the order of the District Court.

Mr. Justice SUTHERLAND concurs in this opinion.

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[3] U. S. Code, Tit. 28, § 41 (20).

[4] *Ford* v. *United States*, 116 U. S. 213; *Finn* v. *United States*, 123 U. S. 227; *United States* v. *Wardwell*, 1222 U. S. 48; *Compagnie Generale* v. *United States*, 51 F. (2d) 1053, 1056. 172

[4] Compare *Johnson* v. *United States Shipping Board*, 280 U. S. 320; *Mara* v. *United States*, 54 F. (2d) 397.

[5] *United States* v. *Jones*, 131 U. S. 1; compare *Holmes* v. *United States*, 78 Fed. 513; *New England Furniture and Carpet Company* v. *United States*, 2 F. Supp. 650.